Synopsis of Contemporary Reports

1914—1925

ALL INDIA REPORTER

1914	1916	1918	1920	1922	1924	1925
41 I. A. **36 All.** 12 *A L J*	**43 I. A.** **38 All.** 14 *A L J*	**45 I. A.** **40 All.** 16 *A L J*	**47 I. A.** **42 All.** 18 *A L J*	**49 I. A.** **44 All.** 20 *A L J*	**51 I. A.** **46. All.** 22 *A L J*	**52 I. A.** **47 All.** 23 *A L J*
38 Bom. 16 *Bom L R*	**40 Bom.** 18 *Bom L R*	**42 Bom.** 20 *Bom LR*	**44 Bom.** 22 *Bom LR*	**46 Bom.** 24 *Bom LR*	**48 Bom.** 26 *Bom L R*	**49 Bom.** 27 *Bom L R*
41 Cal. 18 *C W N* 19, 20 *C. LJ*	**43 Cal.** 20 *C W N* 23,24 *C L J*	**45 Cal.** 22 *C W N* 27,28 *C L J*	**47 Cal.** 24 *C W N* 31,32 *C L J*	**49 Cal.** 26 *C W N* 35,36 *C LJ*	**51 Cal.** 28 *C W N* 39, 40 *C L J*	**52 Cal.** 29 *C W N* 41, 42 *C L J*
1914 P. R. 1914 *P L R* 1914 *PWR* 15 *Cr L J* 22 *to* 25 *I C*	**1916 P. R.** 1916 *P L R* 1916 *PWR* 17 *Cr L J* 32 *to* 36 *I C*	**1918 P. R.** 1918 *PLR* 1918 *PW R* 19 *Cr L J* 43 *to* 48 *I C*	**1 Lah.** 1920 *P L R* 1920 *P W R* 21 *Cr L J* 54 *to* 58 *I C*	**3 Lah.** 1922 *P L R* 1922 *P W R* 23 *Cr L J* 64 *to* 68 *I C*	**5 Lah.** 25 *Cr L J* 75 *to* 84 *I C*	**6 Lah.** 26 *Cr L J* 85 *to* 90 *I C*
37 Mad 26. 27 *MLJ* 15,16 *M L T* 1 *M L W* 1914 *MWN* **10 N L. R**	**39 Mad.** 30, 31 *MLJ* 19. 20 *MLT* 3, 4 *MLW* 1916 *MWN* **12 N. L. R**	**41 Mad.** 34,35 *MLJ* 23,24 *MLT* 7,8 *M L W* 1918 *MWN* **14 N.L.R.** 1 *N L J*	**43 Mad.** 38,39 *M L J* 27, 28 *MLT* 11 12 *MLW* 1920 *M W N* **16 N. L. R.** 3 *N L J*	**45 Mad.** 42, 43 *MLJ* 30, 31 *MLT* 15,16 *MLW* 1922 *MWN* **18 N. L. R** 5 *N L J*	**47 Mad.** 46,47 *ML* 34, 35 *MLT* 19,20 *MLW* 1924 *MWN* **20 N. L. R** 7 *N L J*	**48 Mad.** 48, 49 *MLJ* 31,22 *MLW* 1925 *M W N* **21 N. L. R.** 8 *N L J*
17 O. C. 1 *O L J*	**19 O. C.** 3 *O L J*	**21 O. C.** 5 *O L J*	**23 O. C.** 7 *O L J*	**25 O. C.** 9 *O L J*	**27 O. C** 11 *O L J*	**28 O. C.** 12 *O L J*
	1 Pat L. J 1 *Pat L W*	**3 Pat L. J** 4,5 *Pat LW*	**5 Pat. L. J.** 1 *P L T*	**1 Pat.** 1922 *PHCC* 3 *P L T*	**3 Pat.** 1924 *PHCC* 2 *Pat L R* 5 *P L T*	2 *O W N* **4 Pat.** 1925 *PHCC* 3 *Pat L R* 6 *P L T*
7 L. B. R. **2 U. B. R.** 7 *Bur L T* **8 S. L. R.**	**8 L. B. R.** **2 U B. R.** 9 *Bur L T* **10 S. L. R**	**9 L. B. R.** **3 U B. R** 11 *Bur L T* **12 S. L. R**	**10 L. B. R.** **4 U. B. R** 13 *Bur. L T* **14 S. L. R.**	**11 L. B. R** **4 U. B. R.** 1 *Bur L J* **16 S. L. R**	**2 Rang.** 3 *Bur L J* **17 S. L. R.**	**3 Rang.** 4 *Bur L J* **18 S. L. R.**

Synopsis of Contemporary Reports

1927—1934

ALL INDIA REPORTER

1927	1929	1930	1931	1932	1933	1934
54 I. A. **49 All.** 25 *A L J*	**56 I. A.** **51 All.** 1929 *A L J*	**57 I. A.** **52 All.** 1930 *A L J*	**58 I. A.** **53 All.** 1931 *A L J*	**59 I. A.** **54 All.** 1932 *A L J*	**60 I. A.** **55 All.** 1933 *A L J*	**61 I. A** **56. All.** 1934 *A L J*
51 Bom. 29 *Bom L R*	**53 Bom.** 31 *Bom L R*	**54 Bom.** 32 *Bom L R*	**55 Bom** 33 *Bom L R*	**56 Bom.** 34 *Bom L R*	**57 Bom.** 35 *Bom L R*	**58 Bom.** 36 *Bom L R*
54 Cal. 31 *C W N* 45,46 *C L J*	**56 Cal.** 33 *C W N* 49, 50 *C L J*	**57 Cal.** 34 *C W N* 51,52 *C L J*	**58 Cal.** 35 *C W N* 53,54 *C L J*	**59 Cal.** 36 *C W N* 55, 56 *C L J*	**60 Cal.** 37 *C W N* 57, 58 *C L J*	**61 Cal.** 38 *C W N* 59,60 *C L J*
8 Lah. 28 *P L R*	**10 Lah.** 30 *P L R*	**11 Lah.** 31 *P L R*	**12 Lah.** 32 *P L R*	**13 Lah.** 33 *P L R*	**14 Lah.** 34 *P L R*	**15 Lah.** 35 *P L R*
28 *Cr L J* 99 *to* 105 *IC*	30 *Cr L J* 113*to*120 *I C*	31 *Cr L J* 121*to*128 *I C*	32 *Cr L J* 129*to*134 *I C*	33 *Cr L J* 135 *to* 140 *IC*	34 *Cr L J* 141*to*146 *IC*	35 *Cr L J* 147 *I C to*
50 Mad. 52, 53 *M L J* 38,39 *M L T* 25, 26 *M L W* 1927 *M W N*	**52 Mad.** 56,57 *M L J* 2 *Mad Cr C* 29.30 *M L W* 1929 *M W N*	**53 Mad.** 58,59 *M L J* 3 *Mad Cr C* 31,32 *M L W* 1930 *M W N*	**54 Mad.** 60,61 *M L J* 4 *Mad Cr C* 33,34 *M L W* 1931 *M W N*	**55 Mad.** 62, 63 *M L J* 5 *Mad Cr C* 35,36 *M L W* 1932 *M W N*	**56 Mad.** 64,65 *M L J* 1933 *M Cr C* 37, 38 *M L W* 1933 *M W N*	**57 Mad.** 66,67 *M L J* 1634 *M Cr C* 39,40 *M W N* 1934 *M W N*
23 N. L. R 10 *N L J* **1 & 2 Luck**	**25 N. L. R.** 12 *N L J* 1929 *Cr C* **4 Luck.**	**26 N L. R** 13 *N L J* 1930 *Cr C* **5 Luck.**	**27 N. L. R** 14 *N L J* 1931 *Cr C* **6 Luck.**	**28 N. L. R** 15 *N L J* 1932 *Cr C* **7 Luck.**	**29 N. L. R.** 16 *N L J* 1933 *Cr C* **8 Luck.**	**30 N. L. R.** 17 *N L J* 1934 *Cr C* **9 Luck**
4 *O W N* 1 *L C* **6 Pat.**	6 *O W N* **8 Pat.**	7 *O W N* **9 Pat.**	8 *O W N* **10 Pat.**	9 *O W N* **11 Pat.**	10 *O W N* **12 Pat.**	11 *O W N* **13 Pat.**
8 *P L T*	10 *P L T*	11 *P L T*	12 *P L T*	13 *P L T*	14 *P L T*	15 *P L T*
5 Rang. 6 *Bur L J*	**7 Rang.**	**8 Rang.**	**9 Rang.**	**10 Rang.**	**11 Rang.**	**12 Rang.**
20 & 21 SLR	**23 S. L. R.**	**24 S. L. R.**	**25 S. L. R**	**26 S. L. R.**	**27 S. L. R**	**32 S. L. R.**

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1916

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„ Mr. Abdur Rahim, M. A., F. M. U., Bar-at-law.

Puisne Judges :

The Hon'ble Mr. Abdur Rahim, M. A., F. M. U., Bar-at-law.

„ Sir. William Bock Ayling, Kt., I. C. S.

„ Mr. Francis Dupre Oldfield, I. C. S., F. M. U.

„ Diwan Bahadur T. Sadasiva Ayyar, B. A., M. L,

„ Mr. Charles Gordon Spencer, I. C. S.

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„ „ T. V. Seshagiri Ayyar, B. A. B. L., F. M. U.

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„ „ C. Krishnan, M.A., Bar-at-law (*Offg.*).

„ „ John Gunn Burn, B.A., LL.B., Bar-at-law (*Offg.*).

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239	„	„ 80	485	„	„ 920	658	1916	„ 461	889	„	„ 527	1045	1916	„ 1144
250	1917	„ 525	488	1916	„ 523	661	„	„ 835	895	1917	„ 738	1049	1917	„ 151
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MLT	AIR			MLT	AIR			MLT	AIR			MLT	AIR			MLT	AIR		
1	1916	*PC*	78	127	1917	*M*	955	234	1917	*M*	879	329	1917	*M*	390	450	1917	*M*	27
10	,,	,,	96	129	,,	,,	892	235	1916	*PC*	126	334	,,	,,	414	457	,,	,,	789
21	1917	*M*	316	134	,,	,,	267	242	,,	,,	115	335	1916	*PC*	110	472	1916	*PC*	16
25	1916	*PC*	147	137	1916	*PC*	9	247	1917	*M*	453	345	1917	*M*	336	479	1917	*M*	42
31	,,	,,	2	148	1917	*M*	374	252	,,	,,	971	350	,,	,,	201	481	1916	*PC*	20
36	1917	*M*	399	164	1916	*PC*	14	263	,,	,,	874	353	,,	,,	393	486	1918	*M*	1297
44	,,	,,	718	168	,,	,,	117	267	1916	*PC*	256	362	1916	*PC*	89	490	1917	,,	112
50	1916	*PC*	113	172	1917	*M*	103	281	1917	*M*	897	375	1918	*M*	1045	505	1916	*PC*	46
53	,,	,,	1	176	,,	,,	951	284	,,	,,	299	381	1917	,,	988	512	1917	*M*	128
58	1917	*M*	366	180	,,	,,	937	295	1918	,,	1033	383	1916	*PC*	123	520	1918	,,	811
60				194	1916	*PC*	7	303	,,	,,	1100	388	1917	*M*	824	526	1917	,,	43
62	,,	,,	512	204	1917	*M*	442	308	,,	,,	990	391	1918	,,	1187	529	1916	*PC*	49
70	,,	,,	693	211	1916	*PC*	18	311	1917	,,	832	403	,,	,,	1360	533	1918	*M*	1322
78	1916	*PC*	104	216	,,	,,	169	318	,,	,,	939	407	1917	,,	630	544	1917	,,	386
110	,,	,,	132	221	1917	*M*	243	320	,,	,,	418	430	1916	*PC*	148	549	1916	*PC*	141
118	1917	*M*	958	228	,,	,,	689	323	1918	,,	956	435	,,	,,	21	557	1917	*M*	56
126	,,	,,	894	233	,,	,,	772	327	1917	,,	257	447	,,	,,	41	565	,,	,,	421

3 Madras Law Weekly=All India Reporter

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1917	*M*	859	24	1917	*M*	253	34	1917	*M*	363	43	1917	*M*	551	86	1917	*M*	324
13	1916	,,	144	29	,,	,,	838	35	,,	,,	187	67	,,	,,	854	90	,,	,,	780
19	1917	,,	996	30	,,	,,	885	36	,,	,,	76	74	,,	,,	761	105	,,	,,	217
22	,,	,,	269	32	,,	,,	322	38	,,	,,	539	82	,,	,,	145	107	,,	,,	350

3 Madras Law Weekly=All India Reporter—(*Concld*).

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
109	1917	*M*	876	207	1915	*PC*	115	290	1917	*M*	265	402	1917	*M*	194	512	1917	*M*	868
111	,,	,,	297	210	,,	,,	121	293	1915	*PC*	92	403	,,	,,	968	517	,,	,,	149
115	,,	,,	77	216	1917	*M*	930	297	,,	,,	39	405	,,	,,	314	521	,,	,,	691
119	1916	,,	946	227	,,	,,	364	300	1917	*M*	313	408	,,	,,	735	524	,,	,,	659
143	1917	,,	476	228	,,	,,	480	301	,,	,,	616	413	,,	,,	713	525	1916	*PC*	1
145	1915	*PC*	79	231	,,	,,	167	305	,,	,,	389	422	,,	,,	336	528	,,	,,	172
149	,,	,,	33	233	,,	,,	365	308	1915	*PC*	89	430	,,	,,	448	540	,,	,,	2
157	1917	*M*	704	236	,,	,,	293	315	1917	*M*	871	435	,,	,,	358	542	1917	*M*	373
158	,,	,,	576	239	1915	*PC*	83	317	1916	,,	1225	443	,,	,,	465	544	1916	*PC*	78
161	,,	,,	656	244	1917	*M*	853	319	1917	,,	787	454	1915	*PC*	103	551	,,	*M*	795
163	,,	,,	158	246	,,	,,	619	322	,,	,,	571	457	1917	*M*	190	552	1917	,,	653
164	1916	,,	967	249	,,	,,	546	331	,,	,,	872	463	,,	,,	653	553	1916	*PC*	147
168	1917	,,	916	250	,,	,,	945	336	,,	,,	591	466	,,	,,	936	556	,,	,,	256
171	,,	,,	512	252	1915	*PC*	101	338	,,	,,	622	467	,,	,,	681	572	1917	*M*	894
172	,,	,,	670	257	,,	,,	88	339	,,	,,	334	468	,,	,,	669	573	,,	,,	867
174	,,	,,	662	259	,,	,,	41	341	,,	,,	880	471	1916	*PC*	96	576	,,	,,	805
176	,,	,,	667	267	1917	*M*	226	348	,,	,,	431	485	1917	*M*	649	579	,,	,,	988
177	1915	*PC*	37	271	,,	,,	176	368	,,	,,	408	490	,,	,,	288	582	,,	,,	106
181	,,	,,	48	273	,,	,,	984	370	,,	,,	274	495	,,	,,	203	585	,,	,,	773
186	1917	*M*	590	278	,,	,,	802	375	,,	,,	656	496	,,	,,	340	587	,,	,,	743
189	,,	,,	141	283	,,	,,	223	377	,,	,,	664	498	,,	,,	629	589	,,	,,	296
191	,,	,,	979	287	,,	,,	484	379	,,	,,	562	499	,,	,,	290	590	,,	,,	947
192	,,	,,	948	289	,,	,,	705	393	,,	,,	83	504	,,	,,	924	592	,,	,,	958
196	,,	,,	204									508	1916	*PC*	113	601	,,	,,	705

4 Madras Law Weekly=All India Reporter

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1917	*M*	512	125	1917	*M*	662	260	1917	*M*	884	366	1917	,,	418	477	1918	*M*	1033
10	,,	,,	267	126	,,	,,	954	261	,,	,,	201	369	,,	,,	706	486	1916	*PC*	21
15	1916	*PC*	169	128	,,	,,	386	264	,,	,,	214	371	1918	,,	804	499	1917	*M*	452
21–24	1917	*M*	366	133	,,	,,	299	269	1916	*PC*	132	373	1917	,,	687	502	,,	,,	11
				148	,,	,,	845	278	1917	*M*	262	377	,,	,,	889	503	,,	,,	124
				149	,,	,,	374	285	,,	,,	1009	383	,,	,,	971	507	1918	,,	1187
27	,,	,,	108	168	1918	,,	980	286	1918	,,	1152	397	,,	,,	533	521	1917	,,	71
32	,,	,,	628	173	1917	,,	405	288	1916	*PC*	14	399	1914	,,	61	530	1916	*PC*	117
34	,,	,,	886	176	1916	*PC*	73	291	1917	*M*	2	400	1917	,,	453	534	1917	*M*	889
37	,,	,,	693	184	1917	*M*	997	293	,,	,,	399	402	1918	,,	757	535	,,	,,	824
48	,,	,,	892	186	,,	,,	407	300	,,	,,	393	405	1917	,,	139	538	1916	*PC*	89
51	,,	,,	414	189	,,	,,	243	306	,,	,,	578	408	,,	,,	965	552	1917	*M*	888
53	,,	,,	418	193	,,	,,	926	327	,,	,,	772	411	,,	,,	404	553	1916	,,	1213
55	,,	,,	453	198	,,	,,	414	329	,,	,,	248	415	1918	,,	1045	556	1917	,,	769
57	,,	,,	237	200	,,	,,	775	331	,,	,,	355	422	1917	,,	989	558	1916	*PC*	16
58	1916	*PC*	9	214	1916	*PC*	157	332	1918	,,	990	425	,,	,,	832	562	1917	*M*	903
69	,,	,,	115	225	1917	*M*	589	336	1917	,,	963	433	1918	,,	1360	576	1918	,,	1204
73	1917	*M*	967	226	,,	,,	260	337	,,	,,	879	440	1917	,,	664	587	1916	*PC*	166
74	,,	,,	446	228	,,	,,	426	339	,,	,,	20	441	1918	,,	1198	597	,,	,,	20
77	,,	,,	951	238	,,	,,	620	342	1916	*PC*	7	444	,,	,,	1179	602	,,	,,	46
82	,,	,,	937	240	,,	,,	159	349	1918	*M*	1044	452	1917	,,	455	609	1918	*M*	1258
99	,,	,,	111	245	,,	,,	897	351	,,	,,	1100	455	,,	,,	398	611	1917	,,	349
101	1918	,,	884	248	,,	,,	370	357	1917	,,	874	456	1918	,,	1200	613	,,	,,	748
103	1917	,,	836	251	1916	*PC*	126	362	,,	,,	655	458	1916	*PC*	110	615	,,	,,	56
104	,,	,,	442	255	1917	*M*	900	364	1918	,,	1296	465	1917	*M*	27	625	1918	,,	1266
112	,,	,,	447	258	,,	,,	722					472	,,	,,	799	654	,,	,,	1128
114	1916	*PC*	104																

(1916) 1 Madras Weekly Notes=All India Reporter

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1917	*M*	667	31–39	1916	*M*	1170	100	1915	*P.C.*	33	126	1916	*M*	882	160	1917	*M*	619
2	1916	,,	527					107	1917	*M*	297	127	,,	,,	958	162	,,	,,	167
5	,,	,,	534					109	,,	,,	217	129	1917	,,	543	163	,,	,,	713
7	,,	,,	480	67	1915	*PC*	79	110	,,	,,	533	133	,,	,,	590	167	,,	,,	480
8	*Not reportable*			70	,,	,,	48	111	,,	,,	276	135	,,	,,	670	169	,,	,,	476
9	1917	*M*	671	73	,,	,,	101	112	1916	,,	919	137	1915	*PC*	89	171	,,	,,	495
10	1916	,,	924	76	1917	*M*	885	113	,,	,,	1001	142	,,	,,	103	176	1915	*PC*	86
11	,,	,,	749	77	,,	,,	517	119*a*	,,	,,	1058	146	1917	*M*	350	179	1917	*M*	176
12	,,	,,	144	78	,,	,,	363	119*b*	1915	,,	914	147	,,	,,	656	180	,,	,,	333
17–26	1917	,,	859	79	,,	,,	77	121	1916	,,	486	149	,,	,,	143	181	,,	,,	698
				81	,,	,,	352	122*a*	,,	,,	675	150	1915	*PC*	121	184	,,	,,	365
28	,,	,,	996	83	,,	,,	780	122*b*	,,	,,	670	155	1917	*M*	293	186	,,	,,	916
				93	,,	,,	539												
				97	1915	*PC*	37	123	,,	,,	901	156	,,	,,	145				

(1916) 1 Madras Weekly Notes=All India Reporter—(*Concld.*)

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
188	1917	*M*	948	234	1915	*PC*	92	284	1917	*M*	1009	351	1917	*M*	928	406	1916	*PC*	256
190	,,	,,	142	237	1916	*M*	490	286	,,	,,	481	354	,,	,,	198	419	,,	,,	78
192	,,	,,	141	239	1917	,,	228	287	,,	,,	705	358	1916	*PC*	157	425	,,	,,	1
194	,,	,,	546	245	,,	,,	751	288	,,	,,	484	368	1917	*M*	238	428	,,	,,	169
195	,,	,,	739	256	,,	,,	877	290	,,	,,	83	372	,,	,,	340	433	,,	,,	172
198	1915	*PC*	115	258	1915	*PC*	41	301	,,	,,	285	373	,,	,,	274	443	,,	,,	115
201	,,	,,	39	265	1917	*M*	372	306	,,	,,	837	377	1916	*PC*	166	446	,,	,,	73
203	1917	*M*	312	267	,,	,,	854	307	,,	,,	431	384	1917	*M*	344	452	,,	,,	2
206	,,	,,	384	273	,,	,,	616	323	,,	,,	212	391	,,	,,	149	455	,,	,,	202
208	,,	,,	930	276	,,	,,	624	325	,,	,,	323	394	,,	,,	420	460	,,	,,	132
216	,,	,,	984	277	,,	,,	853	327	,,	,,	968	396	,,	,,	649	468	1917	*M*	218
220	,,	,,	324	278	,,	,,	663	328	,,	,,	448	399	1916	*PC*	113	471	,,	,,	988
223	,,	,,	597	279	,,	,,	918	332	1916	*PC*	96	402	1917	*M*	389	473	,,	,,	947
229	1915	*PC*	83					342	1917	*M*	465	403	1916	*PC*	147	474	,,	,,	296

(1916) 2 Madras Weekly Notes=All India Reporter

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1917	*M*	512	107	1917	*M*	886	180	1918	*M*	980	249	1917	*M*	589	325	1918	*M*	1198
7	,,	,,	958	110	1916	*PC*	7	182	1917	,,	858	250	,,	,,	260	327	1917	,,	903
14	,,	,,	108	115	1917	*M*	954	183	,,	,,	889	252	,,	,,	879	336	1916	*PC*	110
18	,,	,,	267	117*a*	1918	,,	998	188	1916	*PC*	117	253	,,	,,	963	341	1917	*M*	71
21	,,	,,	106	117*b*	1917	,,	398	191	1917	*M*	533	254	1918	,,	1296	348	,,	,,	824
23	1916	*PC*	9	118	1918	,,	884	192	,,	,,	386	256*a*	1917	,,	1009	350	,,	,,	681
31	1917	*M*	955	120	1916	*PC*	14	196	,,	,,	124	256*b*	,,	,,	805	351	1918	,,	1179
33	,,	,,	718	123	1917	*M*	414	200	1916	*PC*	18	258	,,	,,	457	358	1917	,,	135
38	,,	,,	277	125	,,	,,	951	203	1917	*M*	159	263	1918	,,	997	360	,,	,,	455
43	,,	,,	578	128	,,	,,	623	207	,,	,,	393	264	1916	,,	1213	361	,,	,,	393
63	,,	,,	894	130	,,	,,	451	210	,,	,,	201	267	1917	,,	687	362	1918	,,	1200
64	,,	,,	334	131	,,	,,	509	213	,,	,,	662	269	,,	,,	452	363	1917	,,	630
65	1916	*PC*	104	133	,,	,,	689	214	,,	,,	884	271	,,	,,	989	385	1918	,,	1210
73	1917	*M*	250	136	,,	,,	951	215	,,	,,	897	273	,,	,,	237	497	,,	,,	1266
79	,,	,,	735	137	,,	,,	374	217	,,	,,	418	276	,,	,,	446	529	1917	,,	49
82	,,	,,	871	152	,,	,,	836	219	,,	,,	950	278	,,	,,	965	541	1916	*PC*	16
84	,,	,,	773	153	1916	*PC*	136	221	,,	,,	799	280	1918	,,	1100	544	,,	,,	123
86	,,	,,	743	156	1917	*M*	620	224	1916	*PC*	21	284	1917	,,	981	548	,,	,,	41
87	,,	,,	706	158	,,	,,	414	233	1917	*M*	979	288	1918	,,	1033	551	,,	,,	46
88*a*	,,	,,	629	159	,,	,,	628	236	,,	,,	849	296	,,	,,	1187	555	,,	,,	89
88*b*	,,	,,	366	161	,,	,,	937	240	1918	,,	804	306	,,	,,	1045	565	,,	,,	148
90				173	,,	,,	453	242	,,	,,	990	312	,,	,,	1204	567	,,	,,	20
92	,,	,,	536	175	1916	*PC*	126	244	1917	,,	874	321	,,	,,	1360	570	,,	,,	49
96	,,	,,	299	179	1917	*M*	612	247	,,	,,	405	324	,,	,,	887	577	,,	,,	27

17 Cr. L. J. and 32 to 36 Indian Cases=All India Reporter.

Pleae refer to Comparative Table No. I in A. I. R. 1916 *Lahore.*

TABLE No. II

Showing seriatim the pages of the ALL INDIA REPORTER, 1917 MADRAS with corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1916 MADRAS.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1916 Madras=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	30	*I C*	423	11	29	*I C*	192	17	38	*Mad*	1096	20(2)	1915	*M W N*	334
FB	38	*Mad*	419		39	*Mad*	101		29	*M L J*	682	23	30	*I C*	425
3	29	*I C*	449		28	*M L J*	444	19	29	*I C*	228		38	*Mad*	424
FB	38	*Mad*	295		17	*M L T*	326		28	*M L J*	327	27	29	*I C*	356
4	32	*I C*	226		1915	*M W N*	316	20 (1)	27	*I C*	863		39	*Mad*	396
	29	*M L J*	730	13	27	*I C*	770		2	*M L W*	102		28	*M L J*	624
5	29	*I C*	135		2	*M L W*	66	20 (2)	29	*I C*	231		1915	*M W N*	369
	17	*M L T*	382	14	29	*I C*	195		39	*Mad*	570				
7	30	*I C*	286		1915	*M W N*	319		29	*M L J*	96	32	31	*I C*	656
	29	*M L J*	110	17	31	*I C*	494		17	*M L T*	427		2	*M L W*	1120

A. I. R. 1916 Madras=Other Journals—(*Contd.*)

A.I.R.	Other Journals		
32	16	*Cr L J*	800
33	29	*I C*	314
	38	*Mad*	1076
	28	*M L J*	525
39	31	*I C*	833
	30	*M L J*	451
	19	*M L T*	296
	2	*M L W*	1214
	1915	*M W N*	968
56	27	*I C*	336
57	28	*I C*	290
	38	*Mad*	260
	28	*M L J*	347
65	20	*I C*	878
	29	*M L J*	538
	18	*M L T*	353
	2	*M L W*	920
	1915	*M W N*	947
72	31	*I C*	161
	39	*Mad*	677
	18	*M L T*	322
	16	*Cr L J*	721
75	29	*I C*	12
	28	*M L J*	617
78	30	*I C*	818
	2	*M L W*	853
80	31	*I C*	326
FB	39	*Mad*	239
	29	*M L J*	607
	18	*M L T*	426
	2	*M L W*	1037
	1915	*M W N*	921
85	28	*I C*	808
88	33	*I C*	216
	1915	*M W N*	650
102	31	*I C*	565
110	30	*I C*	145
FB	39	*Mad*	527
	29	*M L J*	101
	18	*M L T*	95
	1915	*M W N*	504
	16	*Cr L J*	593
116	28	*I C*	934
127	29	*I C*	386
	29	*M L J*	772
	2	*M L W*	509
130	30	*I C*	669
	29	*M L J*	574
	18	*M L T*	327
	2	*M L W*	813
	1915	*M W N*	701
136	31	*I C*	786
	29	*M L J*	717
	19	*M L T*	141
138	28	*I C*	15
	17	*M L T*	139
139	31	*I C*	398
	39	*Mad*	879
	18	*M L T*	424
	2	*M L W*	989
	1915	*M W N*	873
142	28	*I C*	670
	17	*M L T*	260
	2	*M L W*	348
	1915	*M W N*	254
	16	*Cr L J*	334
144	31	*I C*	583
	39	*Mad*	693
	29	*M L J*	788
	3	*M L W*	13
	(1916)1	*M W N*	12
147	30	*I C*	983
	29	*M L J*	362
	2	*M L W*	650
	1915	*M W N*	614
152	31	*I C*	657
	18	*M L T*	525
	2	*M L W*	1191
157	30	*I C*	178
	29	*M L J*	597
	1915	*M W N*	467
165	31	*I C*	927
	2	*M L W*	1140
	1915	*M W N*	880
186	30	*I C*	609
FB	29	*M L J*	389
	18	*M L T*	277
	2	*M L W*	763
	1915	*M W N*	671
208	28	*I C*	141
	28	*M L J*	197
209 (1)	27	*I C*	904
	17	*M L T*	268
	16	*Cr L J*	232
209 (2)	31	*I C*	590
	18	*M L T*	504
	2	*M L W*	1175
	1915	*M W N*	962
214	32	*I C*	5
	30	*M L J*	1
	19	*M L T*	114
	1915	*M W N*	1043
220	21	*I C*	583
FB	14	*M L T*	418
	1913	*M W N*	974
	38	*Mad*	710
	25	*M L J*	625
222	26	*I C*	747
	1914	*M W N*	779
224	28	*I C*	890
229	29	*I C*	113
	39	*Mad*	419
	29	*M L J*	319
	17	*M L T*	411
	2	*M L W*	469
	1915	*M W N*	339
234	27	*I C*	900
	16	*Cr L J*	228
235	30	*I C*	675
	18	*M L T*	273
	2	*M L W*	823
	1915	*M W N*	722
237	28	*I C*	392
	2	*M L W*	286
	28	*M L J*	363
239	26	*I C*	489
	1915	*M W N*	8
242	31	*I C*	152
	18	*M L T*	533
	2	*M L W*	977
	1915	*M W N*	822
248	28	*I C*	895
249	29	*I C*	365
	2	*M L W*	483
	1915	*M W N*	346
263	30	*I C*	375
	39	*Mad*	683
	29	*M L J*	478
	18	*M L T*	148
	2	*M L W*	683
	1915	*M W N*	590
265	21	*I C*	587
265	14	*M L T*	423
	1913	*M W N*	965
	25	*M L J*	608
	38	*Mad*	629
267	26	*I C*	991
	17	*M L T*	85
268	31	*I C*	502
	29	*M L J*	671
	18	*M L T*	469
	2	*M L W*	1099
272	27	*I C*	919
	1915	*M W N*	25
273	28	*I C*	714
	2	*M L W*	369
274	29	*I C*	37
	28	*M L J*	403
	17	*M L T*	247
	2	*M L W*	312
	1915	*M W N*	262
278	30	*I C*	971
	29	*M L J*	236
281	26	*I C*	740
	28	*M L J*	140
	39	*Mad*	376
284	21	*I C*	445
	1913	*M W N*	833
	14	*M L T*	398
	25	*M L J*	572
	38	*Mad*	746
287	28	*I C*	719
288	29	*I C*	237
	39	*Mad*	544
	17	*M L T*	424
290 (1)	27	*I C*	906
	16	*Cr L J*	234
290 (2)	30	*I C*	827
	39	*Mad*	803
	29	*M L J*	467
	2	*M L W*	861
	1915	*M W N*	797
293	21	*I C*	417
FB	25	*M L J*	425
	14	*M L T*	414
	38	*Mad*	482
295	27	*I C*	800
296	29	*I C*	178
FB	29	*M L J*	269
	17	*M L T*	357
298	28	*I C*	871
	28	*M L J*	471
	39	*Mad*	462
	18	*M L T*	76
	1915	*M W N*	596
303	21	*I C*	681
	25	*M L J*	510
	14	*Cr L J*	633
	38	*Mad*	512
304 (1)	27	*I C*	767
	17	*M L T*	142
	16	*Cr L J*	207
304 (2)	29	*I C*	184
	28	*M L J*	495
	17	*M L T*	363
	2	*M L W*	415
308	21	*I C*	930
	1913	*M W N*	977
	14	*M L T*	486
	25	*M L J*	621
	38	*Mad*	635
310	28	*I C*	45
	28	*M L J*	147
310	1915	*M W N*	143
314	30	*I C*	840
FB	39	*Mad*	1
	29	*M L J*	342
	18	*M L T*	236
	2	*M L W*	805
	1915	*M W N*	644
318	27	*I C*	874
	2	*M L W*	148
	28	*M L J*	174
	1915	*M W N*	185
320	21	*I C*	564
	14	*M L T*	392
	1913	*M W N*	871
	38	*Mad*	432
323	28	*I C*	232
	39	*Mad*	283
	17	*M L T*	57
	1915	*M W N*	174
325	21	*I C*	668
	1913	*M W N*	928
	14	*M L T*	443
	14	*Cr L J*	620
	38	*Mad*	602
328	28	*I C*	1
	30	*M L J*	326
	2	*M L W*	157
	1915	*M W N*	170
331	30	*I C*	74
	18	*M L T*	122
	2	*M L W*	632
	1915	*M W N*	531
332	19	*I C*	694
	13	*M L T*	498
	1913	*M W N*	581
	25	*M L J*	393
	38	*Mad*	356
338	21	*I C*	645
FB	25	*M L J*	594
	14	*M L T*	447
	1913	*M W N*	983
	38	*Mad*	466
342 (1)	26	*I C*	891
342 (2)	30	*I C*	815
	2	*M L W*	850
344	21	*I C*	629
	25	*M L J*	567
	38	*Mad*	650
346 (1)	26	*I C*	888
	2	*M L W*	29
346 (2)	28	*I C*	449
347	30	*I C*	101
	39	*Mad*	565
	29	*M L J*	546
	18	*M L T*	394
	2	*M L W*	952
	1915	*M W N*	577
350	19	*I C*	596
	1913	*M W N*	453
	13	*M L T*	469
	24	*M L J*	592
	38	*Mad*	321
363	26	*I C*	946
	2	*M L W*	61
364	19	*I C*	579
	1913	*M W N*	387
	13	*M L T*	421
	25	*M L J*	288
	38	*Mad*	203
373	30	*I C*	63

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A.I.R.		Other Journals	
373	2	*M L W*	322
	1915	*M W N*	252
374	(1)26	*I C*	961
374	(2)21	*I C*	876
FB	25	*M L J*	613
	14	*M L T*	499
	38	*Mad*	646
376	30	*I C*	703
	39	*Mad*	593
	18	*M L T*	200
378	26	*I C*	831
	2	*M L W*	62
379	28	*I C*	459
	17	*M L T*	256
382	26	*I C*	514
383	29	*I C*	145
	2	*M L W*	408
384	28	*I C*	637
	2	*M L W*	346
	1915	*M W N*	274
385	29	*I C*	435
	18	*M L T*	83
386	21	*I C*	556
	14	*M L T*	386
	25	*M L J*	641
	38	*Mad*	524
	1913	*M W N*	926
387	30	*I C*	353
	29	*M L J*	353
	18	*M L T*	164
	2	*M L W*	709
	1915	*M W N*	728
390	27	*I C*	568
391	30	*I C*	755
FB	39	*Mad*	317
	29	*M L J*	481
	18	*M L T*	255
	1915	*M W N*	740
402	29	*I C*	204
	1915	*M W N*	322
404	28	*I C*	389
405	21	*I C*	913
	25	*M L J*	617
	38	*Mad*	459
407	30	*I C*	447
	39	*Mad*	770
	2	*M L W*	939
	1915	*M W N*	413
	16	*Cr L J*	623
408	29	*I C*	109
	39	*Mad*	561
	28	*M L J*	505
	17	*M L T*	398
	2	*M L W*	463
	1915	*M W N*	365
	16	*Cr L J*	477
411	27	*I C*	708
413	30	*I C*	853
	29	*M L J*	357
	18	*M L T*	223
	2	*M L W*	758
	1915	*M W N*	631
415	29	*I C*	168
	17	*M L T*	347
421	28	*I C*	982
422	21	*I C*	698
	25	*M L J*	556
	38	*Mad*	474
424	28	*I C*	345
	17	*M L T*	232
	1915	*M W N*	217
426	27	*I C*	869
	28	*M L J*	136
	2	*M L W*	142
427	28	*I C*	354
429	30	*I C*	785
	18	*M L T*	247
	2	*M L W*	755
430	29	*I C*	976
	28	*M L J*	642
	1915	*M W N*	414
433	30	*I C*	493
	18	*M L T*	119
	2	*M L W*	628
	1915	*M W N*	533
434	28	*I C*	284
	39	*Mad*	389
	28	*M L J*	338
436	27	*I C*	872
	2	*M L W*	145
	1915	*M W N*	190
438	29	*I C*	331
	39	*Mad*	576
	29	*M L J*	178
	18	*M L T*	25
	1915	*M W N*	418
	16	*Cr L J*	491
440	30	*I C*	679
	2	*M L W*	828
441	28	*I C*	492
	1915	*M W N*	209
442	30	*I C*	989
	18	*M L T*	515
443	27	*I C*	944
	2	*M L W*	206
444	28	*I C*	200
	28	*Mad*	153
	28	*M L J*	260
445	30	*I C*	351
	18	*M L T*	163
	1915	*M W N*	640
446	27	*I C*	131
449	29	*I C*	957
	28	*M L J*	696
	1915	*M W N*	488
458	30	*I C*	159
	29	*M L J*	60
	16	*Cr L J*	607
459	27	*I C*	930
	2	*M L W*	212
462	30	*I C*	822
	18	*M L T*	543
	2	*M L W*	858
	1915	*M W N*	842
464	29	*I C*	397
	39	*Mad*	658
	29	*M L J*	87
	18	*M L T*	28
465	30	*I C*	962
	29	*M L J*	558
	18	*M L T*	402
	2	*M L W*	1005
	1915	*M W N*	829
470	19	*I C*	690
	13	*M L T*	460
	1913	*M W N*	642
	25	*M L J*	251
	38	*Mad*	250
473	(1)21	*I C*	387
	14	*M L T*	319
	25	*M L J*	410
	1913	*M W N*	918
473	(1)38	*Mad*	308
473	(2)31	*I C*	74
	29	*M L J*	784
	18	*M L T*	383
	2	*M L W*	999
	1915	*M W N*	817
474	30	*I C*	752
	39	*Mad*	886
	2	*M L W*	937
	1915	*M W N*	841
	16	*Cr L J*	704
475	28	*I C*	833
	2	*M L W*	371
479	29	*I C*	991
	1915	*M W N*	637
480	31	*I C*	179
	29	*M L J*	454
	2	*M L W*	918
	(1916)1	*M W N*	7
481	27	*I C*	269
483	31	*I C*	350
	39	*Mad*	604
	29	*M L J*	521
	18	*M L T*	381
	16	*Cr L J*	750
485	26	*I C*	226
FB	17	*M L T*	84
	38	*Mad*	801
486	31	*I C*	335
	18	*M L T*	459
	(1916)1	*M W N*	121
487	27	*I C*	789
	2	*M L W*	1
489	30	*I C*	451
	38	*Mad*	479
	16	*Cr L J*	627
490	31	*I C*	539
	19	*M L T*	138
	2	*M L W*	1117
	(1916)1	*M W N*	237
492	29	*I C*	252
	2	*M L W*	431
	1915	*M W N*	323
493	27	*I C*	843
	16	*Cr L J*	219
	17	*M L T*	263
	1915	*M W N*	276
494	29	*I C*	62
	2	*M L W*	479
	1915	*M W N*	337
495	26	*I C*	644
	2	*M L W*	107
	16	*Cr L J*	52
496	28	*I C*	847
497	31	*I C*	211
	2	*M L W*	946
	1915	*M W N*	845
498	30	*I C*	432
	38	*Mad*	464
499	27	*I C*	423
500	29	*I C*	188
	28	*M L J*	510
	17	*M L T*	269
	1915	*M W N*	313
502	28	*I C*	840
503	30	*I C*	769
	1915	*M W N*	763
504	27	*I C*	812
505	30	*I C*	605
	1915	*M W N*	636
506	31	*I C*	334
406	18	*M L T*	457
507	(1)29	*I C*	321
	17	*M L T*	392
	16	*Cr L J*	482
507	(2)26	*I C*	618
508	28	*I C*	845
510	27	*I C*	811
511	29	*I C*	183
	17	*M L T*	361
512	(1)26	*I C*	754
512	(2)31	*I C*	491
	38	*Mad*	988
	29	*M L J*	680
514	28	*I C*	959
516	30	*I C*	745
	1915	*M W N*	786
	16	*Cr L J*	697
517	31	*I C*	604
	18	*M L T*	483
	2	*M L W*	1186
519	29	*I C*	588
	39	*Mad*	792
	29	*M L J*	229
	18	*M L T*	75
	1915	*M W N*	448
520	31	*I C*	478
	1915	*M W N*	914
521	30	*I C*	383
	39	*Mad*	584
	18	*M L T*	127
523	29	*I C*	142
	39	*Mad*	488
	28	*M L J*	491
	17	*M L T*	385
	2	*M L W*	403
	1915	*M W N*	327
524	28	*I C*	495
	1915	*M W N*	215
525	26	*I C*	735
526	29	*I C*	394
	29	*M L J*	122
	18	*M L T*	364
	1915	*M W N*	422
527	31	*I C*	377
	39	*Mad*	889
	18	*M L T*	511
	2	*M L W*	1069
	(1916)1	*M W N*	2
	16	*Cr L J*	777
530	28	*I C*	479
531	26	*I C*	645
	2	*M L W*	67
	16	*Cr L J*	53
532	28	*I C*	817
533	26	*I C*	666
	16	*Cr L J*	74
534	(1)28	*I C*	160
	16	*Cr L J*	272
534	(2)31	*I C*	279
	2	*M L W*	1016
	(1916)1	*M W N*	5
535	28	*I C*	378
	28	*M L J*	115
536	31	*I C*	260
	29	*M L J*	779
	18	*M L T*	497
	1915	*M W N*	956
538	28	*I C*	694
	28	*M L J*	334
	17	*L M T*	22

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A.I.R.	Other Journals		
540	31	*I C*	81
	39	*Mad*	1018
	29	*M L J*	505
	2	*M L W*	867
	18	*M L T*	316
	1915	*M W N*	731
544 (1)	28	*I C*	707
	2	*M L W*	366
544 (2)	31	*I C*	59
	29	*M L J*	474
	18	*M L T*	377
	2	*M L W*	890
	1915	*M W N*	765
547 (1)	28	*I C*	709
	17	*M L T*	311
	2	*M L W*	368
547 (2)	30	*I C*	634
	2	*M L W*	803
	1915	*M W N*	768
548	28	*I C*	349
	17	*M L T*	188
549 (1)	30	*I C*	771
	2	*M L W*	607
549 (2)	28	*I C*	266
	2	*M L W*	257
550 (1)	30	*I C*	263
	2	*M L W*	608
550 (2)	28	*I C*	659
	28	*M L J*	397
	17	*M L T*	242
	1915	*M W N*	241
	16	*Cr L J*	323
554 (1)	29	*I C*	23
554 (2)	30	*I C*	260
	18	*M L T*	93
	2	*M L W*	605
555	28	*I C*	97
	39	*Mad*	414
	28	*M L J*	123
	2	*M L W*	180
	1915	*M W N*	177
	16	*Cr L J*	241
557	26	*I C*	888
	1914	*M W N*	911
	27	*M L J*	638
	39	*Mad*	77
558	30	*I C*	497
	39	*Mad*	579
	18	*M L T*	161
	2	*M L W*	585
560	28	*I C*	625
	28	*M L J*	423
	17	*M L T*	300
	1915	*M W N*	303
567	26	*I C*	672
	16	*Cr L J*	80
568	29	*I C*	154
	2	*M L W*	413
569	31	*I C*	322
	29	*M L J*	704
	18	*M L T*	518
571	28	*I C*	522
	28	*M L J*	381
	2	*M L W*	265
	16	*Cr L J*	298
573 (1)	26	*I C*	671
	1914	*M W N*	778
	16	*Cr L J*	79
573 (2)	30	*I C*	522
	18	*M L T*	171
	1915	*M W N*	605
574	28	*I C*	83
	39	*Mad*	386
	28	*M L J*	138
	2	*M L W*	166
	1915	*M W N*	201
575	31	*I C*	312
	18	*M L T*	460
	1915	*M N W*	1021
578	26	*I C*	834
	2	*M L W*	64
579	29	*I C*	241
	39	*Mad*	554
	28	*M L J*	650
	17	*M L T*	419
	1915	*M W N*	626
582	30	*I C*	439
	1915	*M W N*	544
	16	*Cr L J*	615
583	29	*I C*	49
	17	*M L T*	241
	2	*M L W*	320
584	28	*I C*	318
	17	*M L T*	229
	1915	*M W N*	249
587 (1)	31	*I C*	720
	29	*M L J*	760
587 (2)	30	*I C*	430
	38	*Mad*	531
589	31	*I C*	373
	39	*Mad*	942
	29	*M L J*	758
	2	*M L W*	1078
	1915	*M W N*	1023
	16	*Cr L J*	773
590	28	*I C*	829
593	29	*I C*	248
	29	*M L J*	91
	17	*M L T*	453
595	18	*I C*	520
	38	*Mad*	138
	24	*M L J*	298
	13	*M L T*	218
	1913	*M W N*	285
597	28	*I C*	836
598	26	*I C*	692
	39	*Mad*	67
	28	*M L J*	51
	17	*M L T*	29
	2	*M L W*	31
601	18	*I C*	135
	38	*Mad*	134
	1913	*M W N*	72
	13	*M L T*	114
	24	*M L J*	180
603	27	*I C*	889
	2	*M L W*	155
604	23	*I C*	376
	17	*M L T*	222
	1915	*M W N*	225
605	29	*I C*	4
	28	*M L J*	442
	1915	*M W N*	330
	17	*M L T*	389
	39	*Mad*	473
606	26	*I C*	510
	38	*Mad*	1155
607	18	*I C*	64
	24	*M L J*	54
	1913	*M W N*	303
	38	*Mad*	101
610 (1)	28	*I C*	106
610 (1)	16	*Cr L J*	250
610 (2)	29	*I C*	12
	2	*M L W*	428
	17	*M L T*	291
611	27	*I C*	1001
	39	*Mad*	382
	17	*M L T*	186
613	17	*I C*	158
	38	*Mad*	6
	12	*M L T*	405
	23	*M L J*	479
	1912	*M W N*	1080
617	28	*I C*	110
	16	*Cr L J*	254
618	27	*I C*	861
	2	*M L W*	101
	17	*M L T*	85
619 (1)	29	*I C*	151
	2	*M L W*	411
619 (2)	17	*I C*	120
	38	*Mad*	33
621 (1)	29	*I C*	203
	28	*M L J*	441
	1915	*M W N*	330
	39	*Mad*	476
621 (2)	27	*I C*	835
	16	*Cr L J*	211
622 (1)	28	*I C*	159
	1915	*M W N*	275
	16	*Cr L J*	271
622 (2)	29	*I C*	392
	2	*M L W*	517
623	27	*I C*	804
	28	*M L J*	361
624 (1)	29	*I C*	544
	2	*M L W*	532
	16	*Cr L J*	528
624 (2)	27	*I C*	747
	17	*M L T*	80
626	28	*I C*	160
	16	*Cr L J*	272
627 (1)	29	*I C*	585
627 (2)	27	*I C*	409
	39	*Mad*	60
628	29	*I C*	595
	28	*M L J*	377
629 (1)	28	*I C*	277
	2	*M L W*	270
629 (2)	29	*I C*	670
	16	*Cr L J*	542
629 (3)	28	*I C*	373
	17	*M L T*	218
	1915	*M W N*	236
	2	*M L W*	284
630	29	*I C*	740
	1915	*M W N*	414
	2	*M L W*	531
631	28	*I C*	624
	39	*Mad*	447
	29	*M L J*	142
	1915	*M W N*	239
632 (1)	29	*I C*	745
632 (2)	28	*I C*	662
	39	*Mad*	472
	17	*M L T*	330
	28	*M L J*	483
	16	*Cr L J*	326
633 (1)	29	*I C*	747
633 (2)	28	*I C*	956
634 (1)	29	*I C*	860
634 (2)	27	*I C*	824
634 (2)	2	*M L W*	103
635	29	*I C*	974
636 (1)	28	*I C*	957
636 (2)	29	*I C*	997
637	28	*I C*	966
	28	*M L J*	484
	38	*Mad*	548
638	27	*I C*	744
	17	*M L T*	78
639	28	*I C*	999
	1915	*M W N*	272
	16	*Cr L J*	423
640 (1)	30	*I C*	144
	39	*Mad*	543
	17	*M L T*	391
	2	*M L W*	410
	16	*Cr L J*	592
640 (2)	31	*I C*	176
	16	*Cr L J*	736
641	29	*I C*	458
	2	*M L W*	529
642 (1)	30	*I C*	154
	1915	*M W N*	543
	16	*Cr L J*	602
642 (2)	28	*I C*	842
	28	*M L J*	303
644	31	*I C*	813
	2	*M L W*	1212
645	30	*I C*	256
	18	*M L T*	147
646	28	*I C*	853
647 (1)	30	*I C*	258
	2	*M L W*	604
	18	*M L T*	94
	1915	*M W N*	638
647 (2)	29	*I C*	579
	18	*M L T*	401
648	30	*I C*	434
	2	*M L W*	686
	29	*M L J*	274
	16	*Cr L J*	610
649 (1)	28	*I C*	210
	2	*M L W*	239
649 (2)	29	*I C*	583
651	30	*I C*	438
	18	*M L T*	103
	1915	*M W N*	621
	16	*Cr L J*	614
652	31	*I C*	184
	2	*M L W*	941
	1915	*M W N*	793
654	30	*I C*	438
	16	*Cr L J*	614
655 (1)	29	*I C*	905
655 (2)	30	*I C*	444
	39	*Mad*	686
	18	*M L J*	150
	16	*Cr L J*	620
656	31	*I C*	198
	38	*Mad*	682
657 (1)	30	*I C*	450
	38	*Mad*	556*n*
	16	*Cr L J*	626
657 (2)	30	*I C*	455
	38	*Mad*	555
	16	*Cr L J*	631
657 (3)	28	*I C*	205
	1915	*M W N*	204
	17	*M L T*	158
	28	*M L J*	251

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660(1)	30	*I C*	453
	38	*Mad*	551
	16	*Cr L J*	629
660(2)	31	*I C*	206
	18	*M L T*	374
	2	*M L W*	960
	1915	*M W N*	847
662	30	*I C*	453
	38	*Mad*	489
	16	*Cr L J*	629
664	29	*I C*	729
666	31	*I C*	246
	29	*M L J*	694
	18	*M L T*	500
	1915	*M W N*	911
668	28	*I C*	456
670(1)	31	*I C*	272
	18	*M L T*	387
	(1916)1	*M W N*	122
670(2)	30	*I C*	484
	29	*M L J*	452
	1915	*M W N*	639
671	29	*I C*	907
672	31	*I C*	285
	2	*M L W*	1024
673	30	*I C*	507
	1915	*M W N*	543
674(1)	28	*I C*	487
674(2)	30	*I C*	529
	18	*M L T*	171
675(1)	31	*I C*	404
	18	*M L T*	524
	2	*M L W*	1124
	(1916)1	*M W N*	122
	39	*Mad*	885
675(2)	30	*I C*	565
FB	29	*M L J*	183
676	29	*I C*	970
677	30	*I C*	574
	39	*Mad*	915
	18	*M L T*	216
679	28	*I C*	501
	1915	*M W N*	227
680(1)	31	*I C*	704
	29	*M L J*	786
680(2)	30	*I C*	596
	39	*Mad*	834
	29	*M L J*	381
	18	*M L T*	336
	1915	*M W N*	857
685	28	*I C*	504
	1915	*M W N*	228
686(1)	30	*I C*	656
	18	*M L T*	310
	16	*Cr L J*	672
686(2)	31	*I C*	46
	18	*M L T*	366
	2	*M L W*	992
	1915	*M W N*	916
690	30	*I C*	685
	18	*M L T*	346
	2	*M L W*	887
691	31	*I C*	206
	1915	*M W N*	846
692	30	*I C*	713
	39	*Mad*	597
	29	*M L J*	291
	18	*M L T*	220
	2	*M L W*	714
	1915	*M W N*	586
694	**31**	***I C***	**240**
694	2	*M L W*	1074
	29	*M L J*	708
	18	*M L T*	486
	39	*Mad*	876
696(1)	30	*I C*	749
	2	*M L W*	1035
	16	*Cr L J*	701
696(2)	28	*I C*	639
	2	*M L W*	353
	28	*M L J*	292
	1915	*M W N*	276
697	30	*I C*	777
	1915	*M W N*	755
698	28	*I C*	828
	29	*M L J*	464
699(1)	30	*I C*	781
	2	*M L W*	754
699(2)	28	*I C*	925
700	30	*I C*	806
	39	*Mad*	664
	29	*M L J*	763
	1915	*M W N*	866
705	29	*I C*	1003
706 (1)	30	*I C*	832
	1915	*M W N*	792
706 (2)	31	*I C*	305
	2	*M L W*	1066
707	30	*I C*	924
	2	*M L W*	894
	1915	*M W N*	836
708 (1)	31	*I C*	307
	2	*M L W*	1067
708 (2)	30	*I C*	927
709 (1)	31	*I C*	615
	2	*M L W*	1184
	30	*M L J*	404
709 (2)	30	*I C*	991
	2	*M L W*	751
	18	*M L T*	226
711	29	*I C*	657
	16	*Cr L J*	529
713	31	*I C*	650
	2	*M L W*	1126
	16	*Cr L J*	794
714	30	*I C*	977
	2	*M L W*	969
	18	*M L T*	389
	1915	*M W N*	805
717	27	*I C*	952
	39	*Mad*	429
	28	*M L J*	262
	2	*M L W*	196
718	17	*I C*	112
	38	*Mad*	1
	6	*M L W*	564
720	28	*I C*	221
	39	*Mad*	365
	28	*M L J*	285
	2	*M L W*	241
726	29	*I C*	6
727	31	*I C*	102
728 (1)	31	*I C*	87
728 (2)	30	*I C*	707
	39	*Mad*	923
	30	*M L J*	460
	18	*M L T*	313
	1915	*M W N*	769
731	28	*I C*	632
	2	*M L W*	337
732 (1)	30	*I C*	753
	18	*M L T*	400
732(2)	1915	*M W N*	844
732 (2)	31	*I C*	175
	2	*M L W*	958
	16	*Cr L J*	735
733	29	*I C*	8
734 (1)	30	*I C*	832
	29	*M L J*	182
734 (2)	31	*I C*	192
	39	*Mad*	689
738	29	*I C*	10
739	31	*I C*	209
740 (1)	28	*I C*	638
	2	*M L W*	352
740 (2)	30	*I C*	845
	18	*M L T*	243
743	17	*I C*	337
	38	*Mad*	67
	23	*M L J*	607
	12	*M L T*	535
	1912	*M W N*	1217
745 (1)	30	*I C*	942
	18	*M L T*	312
745 (2)	17	*I C*	420
	38	*Mad*	36
	23	*M L J*	513
	1912	*M W N*	1152
747	30	*I C*	927
	2	*M L W*	1025
	1915	*M W N*	810
749	31	*I C*	220
	(1916)1	*M W N*	11
750	30	*I C*	950
	38	*Mad*	664
751	17	*I C*	769
FB	38	*Mad*	48
	24	*M L J*	240
	13	*M L T*	166
761	29	*I C*	26
762 (1)	31	*I C*	236
	29	*M L J*	231
762 (2)	30	*I C*	1005
	16	*Cr L J*	717
763 (1)	29	*I C*	29
763 (2)	30	*I C*	188
	29	*M L J*	120
765	29	*I C*	31
767	30	*I C*	246
	2	*M L W*	688
	1915	*M W N*	793
768	17	*I C*	933
	38	*Mad*	86
	23	*M L J*	695
	12	*M L T*	605
770	31	*I C*	250
774 (1)	30	*I C*	248
	2	*M L W*	635
774 (2)	29	*I C*	36
775	31	*I C*	367
	16	*Cr L J*	767
779	30	*I C*	272
	18	*M L T*	129
783	29	*I C*	72
	16	*Cr L J*	440
786 (1)	31	*I C*	372
	16	*Cr L J*	772
786 (2)	30	*I C*	280
	2	*M L W*	689
788	29	*I C*	78
	16	*Cr L J*	446
789 (1)	31	*I C*	393
789 (2)	30	*I C*	355
789(2)	2	*M L W*	695
	29	*M L J*	276
	18	*M L T*	151
	39	*Mad*	494
792	29	*I C*	239
	38	*Mad*	221
795 (1)	31	*I C*	671
	3	*M L W*	551
795 (2)	30	*I C*	357
	29	*M L J*	219
801	29	*I C*	255
	38	*Mad*	280
807	31	*I C*	543
	25	*M L J*	637
809	30	*I C*	380
	2	*M L W*	693
	18	*M L T*	145
	1915	*M W N*	725
810	29	*I C*	329
	38	*Mad*	304
	16	*Cr L J*	489
811	31	*I C*	678
816	30	*I C*	402
	38	*Mad*	414
818	29	*I C*	947
820	31	*I C*	799
821	30	*I C*	408
	38	*Mad*	519
823	29	*I C*	449
	29	*M L J*	125
	1915	*M W N*	408
825	31	*I C*	854
826	30	*I C*	416
	18	*M L T*	142
828 (1)	29	*I C*	574
828 (2)	31	*I C*	814
829	30	*I C*	435
	2	*M L W*	631
	18	*M L T*	121
	16	*Cr L J*	611
830	29	*I C*	575
832	31	*I C*	816
833 (1)	30	*I C*	435
	16	*Cr L J*	611
833 (2)	29	*I C*	578
834	31	*I C*	825
	16	*Cr L J*	809
835	30	*I C*	511
	2	*M L W*	637
	1915	*M W N*	534
	29	*M L J*	667
	39	*Mad*	661
836	29	*I C*	763
839	31	*I C*	827
	16	*Cr L J*	811
840 (1)	30	*I C*	544
	2	*M L W*	729
	18	*M L T*	199
	39	*Mad*	583
840 (2)	31	*I C*	829
	16	*Cr L J*	813
841	30	*I C*	569
	18	*M L T*	209
	29	*M L J*	525
	1915	*M W N*	852
	39	*Mad*	1010
845	31	*I C*	269
847 (1)	29	*I C*	832
	38	*Mad*	305
847 (2)	30	*I C*	413

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A.I.R.		Other Journals	
847	(2)38	*Mad*	452
849	29	*I C*	860
851	(1)31	*I C*	106
851	(2)28	*I C*	518
	39	*Mad*	449
	28	*M L J*	329
	17	*M L T*	214
	1915	*M W N*	229
	16	*Cr L J*	294
854	31	*I C*	819
	2	*M L W*	1200
	18	*M L T*	602
	16	*Cr L J*	803
	39	*Mad*	946
856	18	*I C*	203
	38	*Mad*	114
	24	*M L J*	84
	13	*M L T*	179
	1913	*M W N*	163
858	31	*I C*	188
	39	*Mad*	602
	29	*M L J*	728
859	16	*I C*	877
	38	*Mad*	18
862	31	*I C*	739
863	17	*I C*	837
	38	*Mad*	310
	23	*M L J*	576
	12	*M L T*	484
	1912	*M W N*	1168
869	31	*I C*	38
	2	*M L W*	948
871	30	*I C*	488
	18	*M L T*	254
	2	*M L W*	719
	1915	*M W N*	907
873	31	*I C*	55
	18	*M L T*	343
	2	*M L W*	912
	1915	*M W N*	815
875	29	*I C*	916
	29	*M L J*	583
	18	*M L T*	110
	2	*M L W*	542
	1915	*M W N*	397
882	31	*I C*	200
	39	*Mad*	882
	18	*M L T*	495
	(1916)	1 *M W N*	126
883	28	*I C*	367
	39	*Mad*	1196
	17	*M L T*	208
	1915	*M W N*	211
886	31	*I C*	293
	2	*M L W*	1055
887	(1)29	*I C*	579
887	(2)31	*I C*	830
	16	*Cr L J*	814
887	(3)32	*I C*	30
	39	*Mad*	896
	30	*M L J*	13
	18	*M L T*	596
891	(1)31	*I C*	852
891	(2)17	*I C*	425
	38	*Mad*	25
	23	*M L J*	373
	1912	*M W N*	1086
895	31	*I C*	387
	2	*M L W*	1129
896	29	*I C*	785
897	(1)31	*I C*	869
897	(2)17	*I C*	597
	38	*Mad*	71
	23	*M L J*	599
	12	*M L T*	530
	1912	*M W N*	1237
901	31	*I C*	487
	18	*M L T*	521
	(1916)1	*M W N*	123
903	30	*I C*	41
	29	*M L J*	53
907	31	*I C*	986
908	(1)28	*I C*	377
	17	*M L T*	224
908	(2)31	*I C*	499
909	29	*I C*	924
911	31	*I C*	630
	18	*M L T*	492
	2	*M L W*	1132
912	30	*I C*	94
	39	*Mad*	645
	29	*M L J*	1
	18	*M L T*	67
	2	*M L W*	661
	1915	*M W N*	547
917	31	*I C*	645
	2	*M L W*	1208
	16	*Cr L J*	789
918	28	*I C*	429
919	(1)31	*I C*	853
	18	*M L T*	517
	(1916)1	*M W N*	112
919	(2)30	*I C*	106
	39	*Mad*	772
	29	*M L J*	18
	18	*M L T*	19
	1915	*M W N*	424
924	31	*I C*	908
	(1916)1	*M W N*	10
925	16	*I C*	939
	38	*Mad*	45
	23	*M L J*	518
	12	*M L T*	499
	1912	*M W M*	1166
926	(1)31	*I C*	913
	1915	*M W N*	864
926	(2)29	*I C*	471
927	31	*I C*	536
	2	*M L W*	1115
928	(1)29	*I C*	474
928	(2)31	*I C*	579
930	(1)32	*I C*	44
	29	*M L J*	504
930	(2)31	*I C*	982
931	30	*I C*	152
	39	*Mad*	505
	28	*M L J*	692
	1915	*M W N*	540
	16	*Cr L J*	600
933	31	*I C*	642
	16	*Cr L J*	786
934	30	*I C*	317
FB	38	*Mad*	927
	29	*M L J*	195
937	31	*I C*	9
	1915	*M W N*	643
938	29	*I C*	475
939	31	*I C*	12
	29	*M L J*	314
	18	*M L T*	218
	1915	*M W N*	726
940	(1)30	*I C*	370
940	(1)29	*M L J*	86
940	(2)29	*I C*	482
942	31	*I C*	104
	18	*M L T*	398
	2	*M L W*	1031
	29	*M L J*	572
	39	*Mad*	873
943	30	*I C*	895
	2	*M L W*	916
944	31	*I C*	234
	2	*M L W*	1002
	18	*M L T*	385
	29	*M L J*	569
	1915	*M W N*	850
	39	*Mad*	936
946	32	*I C*	279
	30	*M L J*	163
	19	*M L T*	6
	3	*M L W*	119
	1915	*M W N*	1025
957	31	*I C*	263
	2	*M L W*	1034
958	(1)32	*I C*	691
	1915	*M W N*	865
958	(2)31	*I C*	318
	29	*M L J*	669
	18	*M L T*	475
	(1916)1	*M W N*	127
959	29	*I C*	511
960	31	*I C*	397
961	28	*I C*	633
	2	*M L W*	239
962	31	*I C*	446
963	29	*I C*	512
964	31	*I C*	454
966	**FB**28	*I C*	640
967	(1)31	*I C*	457
967	(2)29	*I C*	541
	3	*M L W*	164
	16	*Cr L J*	525
969	31	*I C*	458
970	(1)28	*I C*	733
	39	*Mad*	537
	1915	*M W N*	240
	16	*Cr L J*	349
970	(2)31	*I C*	468
972	29	*I C*	556
974	31	*I C*	473
975	29	*I C*	559
976	31	*I C*	482
	29	*M L J*	632
979	28	*I C*	898
	28	*M L J*	326
	17	*M L T*	191
980	31	*I C*	255
	39	*Mad*	795
	29	*M L J*	639
	2	*M L W*	1046
	18	*M L T*	464
983	29	*I C*	573
984	(1)31	*I C*	267
	1915	*M W N*	915
984	(2)29	*I C*	575
985	31	*I C*	296
	39	*Mad*	843
	30	*M L J*	317
	18	*M L T*	450
	2	*M L W*	1057
	1915	*M W N*	941
990	(1)28	*I C*	955
980	(2)31	*I C*	412
FB	39	*Mad*	811
	29	*M L J*	645
	2	*M L W*	1080
	18	*M L T*	436
	1915	*M W N*	927
1001	(1)28	*I C*	956
	2	*M L W*	723
1001	(2)31	*I C*	528
	29	*M L J*	685
	18	*M L T*	476
	2	*M L W*	1107
	(1916)1	*M W N*	113
1006	28	*I C*	970
	28	*M L J*	488
	2	*M L W*	537
1007	31	*I C*	643
	16	*Cr L J*	787
1008	(1)28	*I C*	992
1008	(2)31	*I C*	871
1008	(3)32	*I C*	769
	29	*M L J*	629
1010	31	*I C*	917
1011	32	*I C*	802
	1915	*M W N*	908
1013	31	*I C*	923
	18	*M L T*	601
	2	*M L W*	1205
1014	16	*I C*	820
	38	*Mad*	15
	24	*M L J*	73
1015	(1)29	*I C*	671
	16	*Cr L J*	543
1015	(2)30	*I C*	721
	16	*Cr L J*	673
1016	31	*I C*	98
	18	*M L T*	349
	29	*M L J*	724
	1915	*M W N*	801
	39	*Mad*	673
1019	32	*I C*	919
	29	*M L J*	746
1021	29	*I C*	670
	16	*Cr L J*	542
1022	31	*I C*	920
	29	*M L J*	698
1025	(1)30	*I C*	191
1025	(2)32	*I C*	763
	1915	*M W N*	761
1028	(1)30	*I C*	1004
	16	*Cr L J*	716
1028	(2)31	*I C*	913
1029	29	*I C*	634
	32	*M L J*	407
	40	*Mad*	722
1034	(1)30	*I C*	1001
	16	*Cr L J*	713
1034	(2)32	*I C*	610
	1915	*M W N*	785
1035	(1)30	*I C*	748
	16	*Cr L J*	700
1035	(2)31	*I C*	214
	29	*M L J*	535
1037	(1)29	*I C*	456
1037	(2)30	*I C*	749
	16	*Cr L J*	701
1038	(1)29	*I C*	88
	16	*Cr L J*	456
1038	(2)32	*I C*	1003
	38	*Mad*	1102
1040	(1)31	*I C*	304

A. I. R. 1916 Madras=Other Journals—(*Concld.*)

A.I.R.		Other Journals	
1040(2)29		*I C*	770
	2	*M L W*	562
	29	*M L J*	144
1047	30	*I C*	689
1048	32	*I C*	129
	2	*M L W*	1244
	17	*Cr L J*	1
1049	30	*I C*	751
	16	*Cr L J*	703
1050	31	*I C*	273
	29	*M L J*	514
1054(1)30		*I C*	486
1054(2)29		*I C*	505
1058	33	*I C*	858
	(1916)1	*M W N*	119
1059	29	*I C*	98
	16	*Cr L J*	466
1061	31	*I C*	310
	39	*Mad*	808
1062(1)30		*I C*	778
1062(2)31		*I C*	343
	16	*Cr L J*	743
1063	33	*I C*	303
	38	*Mad*	1088
	17	*Cr L J*	132
1065(1)30		*I C*	683
1065(2)31		*I C*	340
	16	*Cr L J*	740
1066	29	*I C*	712
1068	31	*I C*	4
1069	29	*I C*	344
1070	30	*I C*	839
1071(1)29		*I C*	672
	16	*Cr L J*	544
1071(2)30		*I C*	768
1072	31	*I C*	1
1074	29	*I C*	898
1078	30	*I C*	517
1079	31	*I C*	18
1080	29	*I C*	124
1083(1)30		*I C*	639
1083(2)31		*I C*	21
1084	29	*I C*	90
	16	*Cr L J*	458
1085	18	*I C*	41
	24	*M L J*	31
	1913	*M W N*	261
	38	*Mad*	108
1088	31	*I C*	15
	5	*M L W*	220
1089	30	*I C*	606
1090	29	*I C*	269
1092	31	*I C*	93
	18	*M L T*	348
	1915	*M W N*	813
1093	18	*I C*	617
	24	*M L J*	41
	38	*Mad*	92
1097	30	*I C*	586
1098	31	*I C*	353
	16	*Cr L J*	753
1099	29	*I C*	427
1101(1)31		*I C*	25
1101(2)29		*I C*	455
1103(1)30		*I C*	464
	16	*Cr L J*	640
1103(2)31		*I C*	317
1104(1)30		*I C*	691
1104(2)31		*I C*	911
1105	29	*I C*	71
	28	*M L J*	486
	17	*M L T*	446
	16	*Cr L J*	439
1106(1)30		*I C*	144
	16	*Cr L J*	592
1106(2)29		*I C*	830
	17	*M L T*	457
	28	*M L J*	690
	1915	*M W N*	411
	16	*Cr L J*	558
1108(1)34		*I C*	305
	28	*M L J*	379
	17	*Cr L J*	193
1108(2)30		*I C*	750
	16	*Cr L J*	702
1109	29	*I C*	85
	16	*Cr L J*	453
1110	14	*I C*	305
FB	11	*M L T*	367
	1912	*M W N*	499
	22	*M L J*	419
	13	*Cr L J*	209
	39	*Mad*	750
1119	16	*I C*	971
	12	*M L T*	469
	23	*M L J*	531
	1912	*M W N*	1162
	38	*Mad*	41
1121	30	*I C*	481
1122	32	*I C*	1002
	38	*Mad*	1099
1123	30	*I C*	461
	16	*Cr L J*	637
1124	18	*I C*	719
	24	*M L J*	342
	1913	*M W N*	216
	13	*M L T*	291
	38	*Mad*	155
1125	29	*I C*	336
	16	*Cr L J*	498
1126(1)30		*I C*	450
	16	*Cr L J*	626
1126(2)31		*I C*	52
	18	*M L T*	371
	2	*M L W*	964
	29	*M L J*	721
1126(2)1915		*M W N*	819
1128(1)29		*I C*	586
1128(2)32		*I C*	691
	1915	*M W N*	864
1129	18	*I C*	1
	38	*Mad*	79
1133	31	*I C*	216
	29	*M L J*	551
1137	30	*I C*	76
1138(1)29		*I C*	265
1138(2)19		*I C*	700
	13	*M L T*	497
	1913	*M W N*	637
	38	*Mad*	274
1139	30	*I C*	79
1142(1)32		*I C*	809
	1915	*M W N*	791
1142(2)31		*I C*	796
	18	*M L T*	532
1143(1)31		*I C*	35
1143(2)29		*I C*	586
1144(1)30		*I C*	446
	16	*Cr L J*	622
1144(2)32		*I C*	326
FB	18	*M L T*	549
	1915	*M W N*	1050
	17	*Cr L J*	38
	39	*Mad*	1045
1146	31	*I C*	259
1147	30	*I C*	166
1153	29	*I C*	587
1154	32	*I C*	759
	1915	*M W N*	784
1155(1)30		*I C*	440
	16	*Cr L J*	616
1155(2)29		*I C*	601
1155(3)32		*I C*	816
	2	*M L W*	1207
1156	29	*I C*	128
1157	31	*I C*	224
	29	*M L J*	280
	39	*Mad*	781
1163	30	*I C*	135
	16	*Cr L J*	583
1164	29	*I C*	234
1165	31	*I C*	924
	29	*M L J*	663
1167	33	*I C*	234
	1915	*M W N*	643
1168(1)31		*I C*	176
	1915	*M W N*	554
	16	*Cr L J*	736
1168(2)30		*I C*	692
1170(1)29		*I C*	246
1170(2)33		*I C*	858
FB	29	*M L J*	793
	"	"	816
1170(2)2		*M L W*	1247
FB	"	"	1266
	18	*M L T*	552
	"	"	568
	(1916) 1	*M W N*	31
	"	"	39
	39	*Mad*	136
	"	"	159
1195	31	*I C*	664
1196	29	*I C*	718
1202(1)31		*I C*	320
1202(2)30		*I C*	831
1203(1)29		*I C*	132
1203(2)31		*I C*	385
1204	29	*I C*	380
1206	30	*I C*	812
1207(1)31		*I C*	811
	2	*M L W*	1210
1207(2)29		*I C*	275
1210	30	*I C*	897
1211	31	*I C*	359
	16	*Cr L J*	759
1212	30	*I C*	391
1213	29	*I C*	422
	(1916)2	*M W N*	264
	4	*M L W*	553
1215	31	*I C*	77
1218	30	*I C*	386
1299(1)29		*I C*	605
1219(2)31		*I C*	978
1220(1)30		*I C*	136
	16	*Cr L J*	584
1220(2)29		*I C*	846
FB	29	*M L J*	12
	18	*M L T*	46
	39	*Mad*	235
1222(1)31		*I C*	337
	16	*Cr L J*	737
1222(2)30		*I C*	372
1223	29	*I C*	96
	2	*M L W*	363
	16	*Cr L J*	464
1224(1)31		*I C*	919
1224(2)30		*I C*	442
	16	*Cr L J*	618
1225(1)29		*I C*	879
FB	29	*M L J*	16
	39	*Mad*	128
1225(2)31		*I C*	803
	18	*M L T*	542
	3	*M L W*	317
	39	*Mad*	1029
1226(1)30		*I C*	158
	16	*Cr L J*	606
1226(2)28		*I C*	643
	1915	*M W N*	233
	16	*Cr L J*	307

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MADRAS HIGH COURT.

A. I. R. 1916 Madras (1)

FULL BENCH.

WHITE, C.J., AND SANKARAN NAIR AND TYABJI, JJ.

P. Abdul Khadir—Counter-Petitioner No. 2—Appellant.

v.

A. Ahammad Shaiwa Ravuthar and *others*—Petitioners and Counter-Petitioners—Respondents.

Letters Patent Appeal No. 120 of 1911, decided on 12th March 1913, from the order of Phillips, J., in Appeal against Appellate Order No. 45 of 1910.

(a) Civil P. C. (5 of 1908), S. 48—Extension of time on ground of use of force or fraud in execution is available only against that judgment-debtor who uses it.

Where a decree-holder is prevented from executing his decree by the fraud or force of one of several judgment-debtors within limitation, he can get an extension of the 12 years' period provided for execution of the decree by S. 48 of the Civil Procedure Code, 1908, only as against that judgment-debtor but not as against other judgment-debtors who have not been guilty of fraud or force. [P. 2, C. 1 & 2.]

(b) Interpretation of Statute—In contest between general policy and express words of section the latter prevail.

When there is on one side what is said to be the general policy of an Act and, on the other, the express words of a section dealing with a specific matter, the express words ought to prevail. [P. 2, C. 1.]

J. L. Rosario—for Appellant.

C. V. Anantakrishna Aiyar—for Respondents.

White, C. J.—The only statement of fact which is necessary for the purpose of dealing with the question of law as to the construction of S. 48 of the Civil Procedure Code which has been raised in this appeal is, I think, this: A creditor has obtained a joint and several decree against two judgment-debtors, defendants Nos. 1 and 2. The first defendant has, by force or fraud, prevented the execution of the decree at some time within twelve years immediately before the date of the application to execute the decree. The second defendant has not. I think it is reasonably clear that, if we give to the words of sub-section 2 (*a*) in S. 48 their natural meaning and construe the paragraph as meaning what it says, the construction adopted by Sundara Aiyar, J., is the right construction. The sub-section is as follows:—"Nothing in this section shall be deemed to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application." Now the words are "the judgment-debtor." No doubt the expression "the judgment-debtor" in the singular includes the plural. But as it seems to me it includes the plural in this sense: "where the judgment-debtor has, or if there are two or more judgment-debtors the judgment-debtors have, by fraud or force, prevented the execution of the decree, etc." That construction of the section is in accordance with the literal meaning of the words and with the

well-known principle of construction, which is now embodied in the Statute, that the singular includes the plural. I express no opinion as to whether, when there are two or more joint judgment-debtors, the judgment-creditor can only ask for the extension of the period of limitation when all the judgment-debtors have by force or fraud prevented the execution of the decree. That question was not argued. The contention, on the one hand, was that the judgment-creditor could only pray in aid the benefit of the enactment as against the judgment-debtor who had by force or fraud prevented the execution of the decree and on the other hand, that in a case where a joint judgment-debtor has by fraud or force prevented the execution of the decree, etc., the judgment-creditor is not only entitled to the benefit of the enactment as against that judgment-debtor but also as against any judgment-debtor who has not by fraud or force prevented the execution of the decree. It seems to me that the only way in which we could make it clear that the intention of the Legislature was as Mr. Anantakrishna Aiyar has contended, would be to add to the sub-section a definition clause to this effect, "for the purposes of this section judgment-debtor means the judgment-debtor who has by fraud or force prevented the execution of the decree or any joint judgment-debtor of that debtor." That would be reading into the section a great deal which is not there and, as it seems to me, would be doing violence to the express language of the section. The other construction, in my opinion, is in accordance with the natural meaning of the words used. Mr. Anantakrishna Aiyar has suggested that the policy of the Limitation Act is that where a decree is alive against one of several joint-debtors, it is alive against all the joint-debtors. I am not sure that I am prepared to accept that as a statement of the general policy of the Act; but even if it be so, when we have on the one side what is said to be the general policy of the Act and, on the other, the express words of a section dealing with a specific matter, I think that the express words ought to prevail.

Reliance has also been placed, in support of the contention against the view adopted by Sundara Aiyar, J., on Article 182 of the Limitation Act. Mr. Anantakrishna Aiyar has pointed out that under paragraph 5 the time was from the date of applying in accordance with law to the proper Court for execution, and that *Explanation I* says that where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, shall take effect against them all. That seems to me to be a very different matter from the matter which we are dealing with in this appeal. The principle, I take it, is that if the judgment-creditor does something which keeps alive a joint decree as against one of his joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors and if it is alive, it is, of course, capable of execution. That is a very different matter from the present case, which is not the case of a judgment-creditor having done something, but of the judgment-debtor having done something which, as regards him, no doubt entitled the judgment-creditor to say "my time has been extended." So far as I can see, there is no reason or principle why the judgment-creditor should be entitled to say that, as regards the men who had not prevented by fraud or force, etc., he should also have the benefit of the enactment. I cannot see there is any equity which the judgment-creditor can set up in this case, although it may be that in the cases which are referred to in Article 182 of the Limitation Act there is an equity arising by the fact that he had done something for the purpose of realizing the fruits of his judgment. Here the creditor does nothing but relies upon something which one of his joint judgment-debtors has been doing. An argument was based on paragraph 2, in the third column of Article 182, a suit (*sic*) is kept alive by the fact that an appeal has been brought and it is reasonable enough that time should begin to run in favour of a party who does not appeal, not from the date of the decree of the Court of first instance, but from the date of the decree of the Appellate Court. It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be deprived of the benefit of the prescribed limitation by reason of acts done by his joint judgment-debtor, over whom he has presumably no control and for whose

action he is not responsible. I may refer to the principle which is embodied in the Mercantile Law Amendment Act, and that is in accordance with the principle which I think is applicable here. Before the Mercantile Law Amendment Act of 1856, the English Law was that where one or more of several joint-debtors were beyond the seas when the causes of action arose, the time did not begin to run either in favour of those abroad or those at home until the return of the former. Section 11 of the Mercantile Law Amendment Act provided that, where the cause of action lay against two or more joint-debtors, the person who was entitled to the same should not be entitled to any time within which to commence and sue against any one or more of such joint-debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint-debtors was or were at the time such cause of action accrued beyond the seas.

In my opinion, Sundara Aiyar, J., was right and the plaintiff's application is barred as against the second defendant so far as the prayer for attachment of immoveables is concerned. The order will be modified accordingly. No order as to costs throughout

Sankaran Nair, J.—I agree.

Tyabji, J.—I also agree.

S.N./R.K.

Appeal rejected.

A. I. R. 1916 Madras 3
FULL BENCH.

WHITE, C. J., MILLER AND SANKARAN NAIR, JJ.

Receiver of Nidadavole and *Medur Estates* —Plaintiff—Appellant.

v.

K. Suraparazu and *others*—Defendants—Respondents.

•Second Appeal No. 1538 of 1911, decided on 15th April 1913, against the decree of the Acting Dist. Judge, Kistna, in Appeal Suit No. 457 of 1910.

(a) Madras Estates Land Act (1 of 1908), S. 192—Presentation of Plaint to Collector's head clerk if unauthorised is invalid.

A plaint under the Act presented to the Head Clerk of a Collector is not validly presented, if he is not appointed to receive plaints.

[P. 3, C. 2.]

(b) Limitation Act (9 of 1908), S. 4—Officer authorised to receive plaints in camp—Court is not deemed closed.

A Court is not closed within the meaning of S. 4, if the officer authorised to receive plaints is absent from head-quarters and is in camp.

[P. 4, C. 1.]

(c) Madras High Courts Rule (Civil) R. 14—Applicability.

Rule 14 does not apply to proceedings before a Revenue Court. [P. 4, C. 1.]

P. Nagabhusanam—for Appellant.

V. Ramadoss—for Respondents.

ORDER OF REFERENCE.

Under S. 192 of the Estates Land Act, the provisions of the Civil Procedure Code are made applicable to suits and appeals filed under the Act. S. 26, Civil Procedure Code, enacts that all suits shall be instituted by the presentation of a plaint, and under O. 4, R. 1, the plaint is to be presented to the Court or such officer as it appoints in this behalf. In the case before us, the plaintiff took his plaint to the office of the Head Assistant Collector to whom it had to be presented. That officer was absent from head-quarters and in camp, and the plaintiff accordingly requested the chief ministerial officer of the Court to receive his plaint, but that officer refused to do so, as he was not authorized to receive such plaints; it was presented to the Head Assistant Collector on his return from camp. The suit is barred, if it is held to have been presented only after the return of the Head Assistant Collector. It is not barred, if presentation to the Head Clerk was a valid presentation of the plaint according to law. The question is one of general importance, and we think it desirable that there should be a final decision. We accordingly refer to the Full Bench the question whether, on the facts stated above, the plaintiff's suit is barred by limitation.

OPINION OF THE FULL BENCH.

We think the words "all suits, appeals and other proceedings under this Act," in S. 192 of the Madras Estates Land Act, 1908, may be construed as including the institution of a suit by the presentation of a plaint. The result is that the provisions of the Code of Civil Procedure apply to the presentation of a plaint in a suit under the Estates Land Act. Under S. 121 of the Code of Civil Procedure, the rules in the first Schedule have effect

as if enacted in the body of the Act. O. 4, R. 1, provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. It is, therefore, open to the Collector to appoint an officer to whom plaints may be presented, but this, we understand, has not been done.

It is clear that R. 14 of the Civil Rules of Practice does not apply to proceedings before a Revenue Court, and we cannot accept the contention that, when the plaintiff sought to present his plaint in this case, the Court was closed within the meaning of S. 4 of the Limitation Act.

We must accordingly answer the question in the affirmative.

S. N./R. K.

Reference answered.

A. I. R. 1916 Madras (4)

SADASIVA AIYAR AND SPENCER, JJ.

Maharaja of Jeypore—Plaintiff—Petitioner.

v.

Hari Krishna Patro and *others*—Defendants Nos. 1 to 3—Respondents.

Civil Misc. Petn. No. 1830 of 1913, decided on 30th April, 1915.

(a) Civil P.C. (5 of 1908), O. 21, R. 63—Objection allowed—Suit that same property belongs to judgment-debtor is barred by law in Vizagapatam agency—*Obiter*—There is right to get question about title to attached property decided even in absence of provisions of O. 21, Rr. 58 to 63.

Under the law prevailing in the Vizagapatam Agency a suit will not lie for a declaration that a certain property in respect of which a claim petition has been allowed, is the property of the judgment-debtor. [P. 4, C. 2 & P. 5, C. 1.]

Obiter dicta.—Where a question is raised whether one of the items attached by the Court does in fact belong to the judgment-debtor, the parties have in justice and equity a right to get this question determined even in the absence of express rules providing for claim petitions. [P. 4, C. 2.]

Quære.—Whether there is a Common Law right vested in every subject to have his title, which is in dispute, declared? [P. 5, C. 1.]

(b) Practice—Appeal—No appeal unless provided by statute.

There is no inherent right of appeal where the Statute does not create one. [P. 5, C. 1.]

B. N. Sarma—for Petitioner.

T. Rangachariar—for Respondents.

Order.—The question for decision is whether under the law prevailing in the Vizagapatam Agency, a suit will lie for a declaration that a certain property in respect of which a claim petition has been allowed is the property of the judgment-debtor. The plaintiff is the Maharajah of Jeypore.

In execution of a decree for costs, he got attached a *tope*, to which the 3rd defendant advanced a claim that it was in his possession on behalf of a deity to whom it had been gifted before the attachment. The Special Assistant Agent, upon evidence recorded by the Agency Munsif of Jeypore and upon a report, ordered the attachment to be withdrawn and the execution-petition to be struck off the file. Now the plaintiff has brought this suit to establish the title of defendants Nos. 1 and 2 to the said *tope* and to get the order on the claim petition vacated. Both the Special Assistant Agent and the Agent to the Governor have held that the suit is not maintainable.

Rule 26, clause 2, of the rules framed by the Government under Act XXIV of 1839 for the guidance of the Courts in these Scheduled Districts permits decrees for a sum of money to be executed by selling the lands and other effects *belonging* to the party against whom the judgment may have been given. Where a question is raised whether one of the items attached does in fact *belong* to the judgment-debtor, the parties have in justice and equity a right to get this question determined even though the rules may not expressly provide for claim petitions, and in the present case they did get the ownership of the *tope* decided by the Special Assistant Agent's order of June 19th, 1909. O. 21, R. 63, of the Civil Procedure Code, which gives the right to a party against whom an order in a claim petition is made to institute a suit to establish the right which he asserts, is a provision of the nature of an appeal, as it provides for the decision of a competent Court of civil jurisdiction being superseded by another decision. This provision has not been extended to the Agency Tracts of Vizagapatam, we think, purposely to prevent the unsophisticated inhabitants of those regions being harassed by bewildering multiplicity of legal proceedings.

Rule 13 applies to civil trials in Agency Courts only those rules of the Civil Procedure Code which relate to the examination of witnesses in appealable cases. There is no inherent right of appeal where the Statute does not create one. Consequently, the order of June 19th has become a final one. We notice that this order was based on evidence not recorded by the Judge who passed the order, and we have heard arguments as to whether that procedure was legal. Without deciding whether R. 13, which requires that evidence in "all civil trials" shall be taken in the manner prescribed by the Code of Civil Procedure, has any application to claim petitions in this Agency, we are clearly of opinion that the Judge's procedure, assuming it to have been irregular, has no bearing on the question now at issue, for it has not been hitherto the case of the plaintiff that the order is void through not being based on legal evidence (in which case it would be again open to him to attach the released property), but rather that he has a right to have the order superseded by the decision in a regular suit. Moreover, it does not appear that the plaintiff took objection to the procedure of calling for a report from the Subordinate Court and acting on evidence recorded by it, either when the order was passed or in the trial of the present suit or in his grounds of appeal.

The Agency Courts have further decided that no suit could be brought for a declaration under S. 42 of the Specific Relief Act, as that Act is not in force in the Scheduled Districts. The Hon'ble Mr. Sarma for the appellant, quoting *Robert Fischer* v. *Secretary of State for India in Council* (1), contends that independently of the Specific Relief Act, there is a Common Law right vested in every subject to have his title which is in dispute declared. It is unnecessary to discuss this point, for the nature of the present suit is not that of a mere suit for a declaration as to a legal right or character, but is essentially one to set aside a judicial order upon a claim by a 3rd party to property which was the subject of execution, and such a suit will be maintainable only in localities where by an enactment such as the Civil Procedure Code a statutory right has been created.

(1) (1899) 22 Mad. 270=26 I. A. 16 (P. C.)

The present suit has had a previous history.

It was in the first instance dismissed and the dismissal order was set aside by this Court in Civil Miscellaneous Petition No. 2479 of 1907. It was therein held by another Bench of this Court that the ground upon which the Special Assistant Agent had dismissed the suit, namely, that S. 244 of the Civil Procedure Code of 1882 was a bar to the suit, was not a good one. The suit was in consequence restored to file and again dismissed.

The point which has now been taken was not argued at the hearing of that civil miscellaneous petition nor should the learned Judges, who decided it, be understood as meaning to say that the suit as laid was maintainable from every possible point of view.

The Agent's judgment is right. We dismiss the petition with costs.

S. N./R.K.

Petition dismissed.

A. I. R. 1916 Madras (5)

KUMARASWAMI SASTRI, J.

Lodd Govindoss Krishnadoss and *others* —Plaintiffs.

v.

Rukmani Bhai—Defendant.

Civil Suit No. 199 of 1914, decided on 2nd March, 1915.

Legal Practitioner—Pleader should not appear in case where his evidence would be material.

Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, there is no inflexible rule that his evidence ought not to be taken, if at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice.

[P. 7, C. 2.]

V. C. Seshachariar and *V.V. Srinivasa Aiyangar*—for Plaintiffs.

Venkatasubba Row and *Radhakrishnayya*—for Defendant.

Judgment.—The plaintiffs pray for the reduction of the maintenance decreed to the defendant in Civil Suit No. 187 of 1906 from Rs. 400 to Rs. 100 a month, on the ground that the maintenance decreed in that suit was in respect of the defendant and her daughter and that, owing to her daughter having been married, her maintenance was no longer obli-

gatory on the defendant. The plaintiffs also pray that the decree in Civil Suit No. 187 of 1906 may be rectified by declaring that the amount decreed in that suit was really for the maintenance of the defendant and her daughter and that the amount be reduced to Rs. 100 or such other sum as the Court may think proper.

The case for the plaintiffs is that defendant, who is the step-mother of the 1st plaintiff, filed Civil Suit No. 56 of 1906 in the High Court claiming *inter alia* maintenance for herself and her daughter, that the said suit was permitted to be withdrawn with liberty to file a fresh suit, as it was found that the suit was bad for misjoinder of parties and causes of action that she brought Civil Suits Nos. 187 of 1906 and 188 of 1906 claiming maintenance for herself and her daughter respectively, that the suits were heard together and compromised, the terms being that the plaintiff and her daughter should get Rs. 400 a month for their maintenance, that a decree was passed in Civil Suit No. 187 of 1906 awarding Rs. 400 for maintenance but that, by reason of some mistake, the decree, instead of stating that the maintenance was to be for the defendant and her daughter, simply states that the maintenance was to be for the defendant, that defendant's daughter was married in October 1913 and has attained puberty and gone to live with her husband and that, by reason of this fact, he has no longer to pay Rs. 400 a month but only Rs. 100.

The defendant filed a written statement, denying that the sum of Rs. 400 was the maintenance payable to her and her daughter and stating that the terms of the compromise are correctly set out in the decrees passed in Civil Suits Nos. 187 and 188 of 1906. She states that, although she claimed a much larger sum, Rs. 400 was, by consent of the parties, fixed for her maintenance, that her daughter was then of marriageable age, and that her maintenance was not taken into consideration when the settlement was arrived at. She also states that an application to amend the decree was made before Sir Arnold White but that it was refused, the Chief Justice holding that he had no power to vary his decree and that, even if he had, he would not do so on the merits. The defendant denies that the plaintiffs have any cause of action and states that the matter is *res judicata* and that the plaintiffs are not entitled to any relief. A preliminary issue was settled as to whether the plaintiffs are entitled to vary the terms of the *razinama* decree in Civil Suit No. 187 of 1906. For the reasons given in my judgment dated 8th December 1914, I held that the plaint disclosed a cause of action and that, on the allegations contained in the plaint, the plaintiffs were entitled to sue. I also held that the suit was not barred by *res judicata*. The following additional issues were then settled :—

(*a*) Was it agreed that the maintenance of Rs. 400 should be paid to the defendant and her daughter as alleged in paragraph 6 of the plaint ?

(*b*) If the 1st issue is found in plaintiffs' favour, are they entitled to any reduction in the maintenance allowed by the decree, and, if so, by what amount ?

(*c*) Is the claim of the plaintiff for the rectification of the decree barred by limitation ?

* * * *

The two Suits Nos. 187 and 188 of 1906 came on for hearing before Sir Arnold White and, after they were partheard, a compromise was suggested and the terms of the compromise were admittedly settled in his Lordship's Chambers.

* * * *

The only evidence adduced before me to show that there was any mistake when the compromise decrees in Civil Suits Nos. 187 and 188 of 1906 were entered into, is the evidence of the plaintiff and of Mr. Narasimhachari, the junior Vakil who was present in the Chambers of Sir Arnold White. I may dismiss the evidence of the plaintiff as that of a person who is interested and whose attitude towards his step-mother has been throughout bitterly hostile. He set up the false plea that he was not personally liable and that the decree was wrong in that respect also, and the proceedings after the decree in Civil Suits Nos. 187 and 188 of 1906 show that he left no stone unturned to prevent the plaintiffs therein from realizing the fruits of their decrees. Mr. Narasimhachari, who was present when the compromise was entered into, admits in cross-examination that nobody ex-

pressly stated that the maintenance was to be for both the plaintiff and her daughter and that he does not remember if the daughter's name was mentioned. In answer to a question put by me, he stated that he understood that the arrangement was that Govindoss (1st plaintiff herein) should pay Rs. 400 to the defendant and that she should maintain her daughter, there being no arrangement as to how much should be paid for the daughter's maintenance. He winds up by saying that he cannot say what was understood by all the parties as regards the question of maintenance. All that this witness can state is that he was under the impression that the maintenance of Rs. 400 was to be for the plaintiff and her daughter, but how he came to be under that impression the evidence does not show. As against the evidence of the plaintiff and Mr. Narasimhachari, there is the evidence of Mr. Venkatasubba Row, who appeared for the plaintiff in Civil Suit No. 187 of 1906. He gave his evidence in a straightforward manner and I have no hesitation in accepting his evidence as to what took place in the Chambers of the late Chief Justice.

Objection was taken to Mr. Venkatasubba Row giving evidence, as he was one of the Vakils who appeared for the defendant. I cannot help remarking that the objection comes with very bad grace from the plaintiffs. At the settlement of issues, the plaintiffs were ordered to file a written statement before 16th December 1914 giving full particulars as to the date of the agreement mentioned in the first issue, the parties that were present at the time of the agreement and the parties between whom the agreement was come to. The plaintiffs did not file the particulars and their only excuse was that their Vakil forgot to do so. Though the plaintiffs would have only themselves to thank if the first issue was decided against them and the suit dismissed, I did not want to dismiss the suit, nor did Mr. Venkatasubba Row press for it as the non-filing of the particulars was due to an oversight of the plaintiff's Vakil. When the evidence was gone into, it was alleged that the compromise was in the Chambers of the late Chief Justice and names of the parties present were given. As soon as the plaintiff's evidence was over, Mr. Venkatasubba Row withdrew from the case and it was conducted by Mr. Radhakrishnayya. Under these circumstances I do not see what objection there could be to Mr. Venkatasubba Row giving evidence in this suit. Though it is no doubt desirable that counsel ought not to appear in a case where it is probable that his evidence would be material, I do not think that there is any inflexible rule that his evidence ought not to be taken, if, at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. I have no hesitation in holding that the evidence of the 1st plaintiff and Mr. Narasimhachari is utterly insufficient to show that there was any mistake in the terms as embodied in the decree in Civil Suits Nos. 187 and 188 of 1906.

I find on this issue that there was no mistake in the matter and that the real agreement at the time of the compromise was that Rs. 400 should be paid to the defendant, and not to the defendant and her daughter.

In the result the suit fails and is dismissed with costs.

S. N./R. K.

Suit dismissed.

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WALLIS, C. J., AND TYABJI, J.

In re *Swadeshi Steam Navigation Co. Ltd.*

S. V. Nallaperumal Pillai and *others*—Appellants.

v.

S. D. Krishna Aiyangar and *another*—Respondents.

Appeal Nos. 24, 25, 29 to 32 of 1914, decided on 30th April 1915, against the orders of Dist. Judge, Tinnevelly, dated 22nd December, 1913, in Ex. Petn. Nos. 39 and 42 of 1913.

Companies Act (7 of 1913), Ss. 68 and 120—Debenture creating floating charge enforceable after default does not become enforceable unless debenture-holder takes steps—Acts of Company are not void only because they were after default—That security does not operate *ipso facto* on default—Charge must be registered.

A debenture deed after charging all the assets of a Company by way of a floating charge and providing that notwithstanding such charge the Company shall have power to carry on business and deal with the assets of the Company until default shall have been made for six calendar months in the payment of the principal amount, provided that from and after the happening of such default the liberty and authority herein-before given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable : Default in payment of the principal amount was made but the Company carried on business and created certain charges after the date of default :

Held, (1) that the Company's right to carry on business did not come to an end automatically on the happening of the default but continued until the debenture-holder intervened to show his desire that it should cease, as by applying for a Receiver ; [P. 8, C. 2.]

(2) that the charges created by the Company after default were not void ;

(3) that the floating security remained dormant and could not become fixed or crystallised until the Company ceased to be a going concern or until the debenture-holder intervened.

[P. 9, C. 1.]

A charge created in favour of the officers of a Company cannot be availed of if it is not registered as required by S. 68 of the Indian Companies Act (6 of 1882). [P. 92 & P. 10, C. 2.]

S. Srinivasa Aiyangar, *K. Srinivasa Aiyangar and R. Narayanaswami Iyer*—for Appellants.

T. Narasimha Aiyangar and *C. Padmanabha Iyengar*—for Respondents.

Wallis, C. J.—These are appeals from an order of the District Judge of Tinnevelly in Original Suit No. 307 of 1911, in the matter of the winding-up of the Swadeshi Steam Navigation Company, Limited. By an order of the 27th April 1912 made in the winding-up the District Judge had held that the charges created by a resolution of the Directors in favour of claimants 23 and 16, the Secretary and Manager of the office of the Company, were not rendered invalid by the provisions of the explanation to S. 63 of the Indian Companies Act, 1882, and that they did not amount to a fraudulent preference. The claimants then put in the petitions now under appeal for payment out of the assets of the amounts of their charges when the debenture-holders of the Company, whose rights as secured creditors had not been considered in the previous application, appeared and opposed the applications on the ground that their floating security had become fixed or crystallised and had attached on the assets of the Company before the creation of these charges The District Judge having overruled the objections the debenture-holders have appealed and have raised three contentions in support of their case.

In the *first* place, they rely on the express provision of the debenture-deed, which, after charging all the assets of the Company by way of floating charge and providing that notwithstanding such charge the Company should have power to carry on business and deal with the assets of the Company until default should have been made for six calendar months in the payment of the principal amount which, admittedly happened, provided that from and after the happening of such default the liberty and authority herein-before given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable.

In this connection, it must be borne in mind that the right of the Company to create a charge of this kind is incident to its right to carry on business, and it is quite clear that no such charge can be created after the Company had actually stopped business or after the debenture-holder had intervened under the powers reserved to him to stop the business by obtaining the appointment of a Receiver or petitioning for the winding-up of the Company. The difficulty arises when, as in the present case, the Company has been allowed to go on carrying on business and creating charges, after the happening of any of the events which determined its right to carry on business. In cases of this kind the Courts have been disposed to hold, at any rate when the language of the deed admits of it, that the right to carry on business is not determined automatically by the happening of one of the events indicated, but continues until the debenture-holder intervenes to show his desire that it should cease, as by applying for a Receiver. In *Government Stock Investment and other Securities Company* v. *Manila Railway Co., Ltd.* (1) Lindley, L. J., pointed out the hardship and injustice that must arise to third parties by

(1) (1895) 2 Ch. D. 551=64 L. J. Ch. 740.

the debenture-holders allowing the business to go on after the happening of the specified event and then turning round and treating all the transactions as void under the debenture-deed, and held that such a result was so unreasonable and undesirable that in the absence of an express provision to that effect it ought not to be held to have been in contemplation of the parties. On appeal the House of Lords in *Government Stock and other Securities Investment Company* v. *Manila Railway Co., Ltd.* (2) took the same view and Lord Macnaughten laid down generally that it was the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes.

There was no difficulty in applying that doctrine to the facts of that case, but there is more difficulty when, as in the debenture in *Edward Nelson and Company Ltd.* v. *Faber & Co.* (3), which is in terms identical with the debenture here except in a particular which does not seem very material, it is expressly provided that on the happening of a specified event the liberty and authority of the Company to carry on business shall forthwith cease and the charge created by the debenture shall and may be immediately enforceable. In this case, it would almost seem as if these words had been expressly inserted to take the case out of the decision in *Government Stock and other Securities Investment Company* v. *Manila Railway Co., Ltd.* (2) and to determine the Company's authority to carry on business automatically without any intervention of the debenture-holders. The Courts, however, lean strongly against such a contention, and Joyce, J., has rejected it in *Edward Nelson & Co.* v. *Faber & Co.* (3), a decision which is not appealed against, has been since cited without comment in some cases and in most textbooks, though it is omitted from the last edition of Buckley on companies. In a still later case, *Evans* v. *Rival Granite Quarries Co., Ltd.* (4), Fletcher Moulton, L. J., after referring to the leading cases as to the incidents of a floating security of this kind, observed that in all of the cases the Courts realized that it was impossible to come to any other conclusion than that it was intended to leave the Company free to carry on its business until the time arrived when debenture-holders enforced their security upon the Company's assets and undertaking. And the learned Lord Justice went on to say, not without reference, I cannot help thinking to *Edward Nelson's* case (3) which had been cited in the argument that, though in the earlier cases the actual words of a particular document may have influenced the Courts, it early became clear to the Judges that this did not depend on the special language used but upon the essence and nature of a security of this kind. On the other hand, Lord Justice Buckley in the same case, seems still to have relied on the language of the document and speaking of the various ways in which crystallization may happen and the security become fixed, he said: "A Receiver may be appointed, or the Company may go into liquidation and the liquidator be appointed, or any event may happen which is defined as bringing to an end the license to the Company to carry on business."

In this state of the authorities I hesitate to differ from the decision of Joyce, J., reinforced as it is by the observations of Fletcher Moulton, L. J., although it is not strictly binding on me.

As regards the *second* point, the appellants do not seem to have relied in the lower Court on the fact that the Company had stopped business before the granting of the charges and the evidence taken by the District Judge in the earlier case sufficiently shows that it had not.

The *third* point is that the charges having been created in favour of officers of the Company—one of them is Secretary and the other had been appointed by resolution Manager of the Company's office—and not having been registered as required by S. 68 of the Indian Companies Act of 1882, were not available to the claimants within the meaning of the explanation of that section. This objection was taken by the Liquidator in the earlier case and was overruled by the District Judge, now Mr. Justice Oldfield. It was again expressly taken in the lower Court in this case but was apparently not argued in view of Mr. Oldfield's decision

(2) (1897) A. C. 81=66 L. J. Ch. 102.
(3) (1903) 2 K. B. 367=72 L. J. K. B. 771.
(4) (1910) 2 K. B. 979=79 L. J. K. B. 970.

at an earlier stage. It is not expressly mentioned in the grounds of appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of the statutory provision, we think that we ought to enforce the provisions of the section if they are applicable. The Companies Act of 1862 whilst providing penalties for failure to register mortgages and charges did not provide that unregistered mortgages and charges should be void, but then there were decisions that it would be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir George Jessel criticised these decisions in several cases, pointing out that they imposed an additional penalty not warranted by the statute and his view was finally upheld in 1887 by the House of Lords in *Wright* v. *Horton* (5). At the time when the Indian Companies Act of 1882 was being drafted and passed into law, the other view still prevailed and the Legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Patent Bread Machinery Company, In re, Valpy and Chaplin, Ex parte* (6), Lord Justice James after observing that the mortgage was not void for want of registration went on :— "But as it is the duty of the officers of the Company to see that every charge specifically affecting property of the Company is registered, I am of opinion that no Director, Manager, or other officer of the Company, can avail himself of a charge which is not registered," and he applied the doctrine to a person who had acted as Solicitor of the Company. The same language was used by the Court of Appeal in *South Durham Iron Company, In re, Smith's* case (7), where Sir George Jessel interpreted the decisions as meaning that a Director, Manager or officer cannot avail himself of the security. These are all cases in which the officer had taken a charge in respect of advance made by him to the Company and not for arrears of salary due to him.

The explanation to S. 68, which appears to be intended to reproduce the ruling of Lord Justice James, in *Patent Bread Machinery Co., In re, Valpy & Chaplin, Ex parte* (6), as far as possible in his own language, is as follows :— "Omission to register under this section a mortgage or charge does not render it invalid, but the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting the property of the Company and not so registered." The words "as such" present some difficulty if they mean as "officers of the Company." It is difficult to see what is meant by the officers of the Company availing themselves of a mortgage or charge, unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is I think, clear, that the Legislature was anxious to reproduce not only the substance but as far as possible the very language of the decisions and that this must be accepted as the meaning of the explanation.

The only other point is whether both the claimants were officers of the Company. The Secretary admitted he was ; the other claimant denies that he was an officer of the Company within the meaning of the section and although he would *prima facie* appear to be such yet, as he appears to rely on special facts which he has not had an opportunity of proving, we have decided to call for a finding as to whether he was an officer of the Company within the meaning of the section when he obtained the charges. Fresh evidence may be taken.

The finding should be submitted in one month after the re-opening of the lower Court after the midsummer vacation. Seven days will be allowed for filing objections.

The appeals against orders Nos. 24 and 29 to 31 of 1914 are allowed as against the 23rd claimant with costs.

Tyabji, J.—I agree.

S. N./R. K.

Appeals allowed.

(5) (1887) 12 A.C. 371=56 L.J. Ch. 873.
(6) (1872) 7 Ch. App. 289=26 L T. 228.
(7) (1879) 11 Ch. D. 579=48 L.J. Ch. 480.

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SPENCER AND SESHAGIRI AIYAR, JJ.

Nagar Damodar Shanbhogue—Plaintiff—Appellant.

v.

Gudlimar Rama Rao and *others*—Defendants—Respondents.

First Appeal No. 282 of 1912, decided on 2nd March 1915, against the decree of the Court of Sub-Judge, South Kanara, in Original Suit No. 30 of 1911.

(a) Presidency Banks Act (11 of 1876), S. 37—Scope of S. 37 is to give instruction and define powers of Directors—Disregard of those instructions makes Directors liable for loss—Third parties cannot take advantage of this violation—Director's capacity stated.

Section 37 of the Presidency Banks Act XI of 1876, must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors of a Presidency Bank act in disregard of those powers they render themselves liable to the Bank for any loss that it may sustain by unauthorised acts. The section does not enable third parties, with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum*.

[P. 11, C. 2 & P. 12, C. 1.]

The Directors are not identical with the Bank. They fill a double character, (1) as agents of the Bank, (2) as trustees for share-holders of the power committed to them. Whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations.

[P. 12, C. 1 & 2.]

(b) Presidency Banks Act (11 of 1876), S. 37—Taking security for future advances though beyond power is not void *ab initio*—Restrictions of powers when in interest of share-holders would be strictly enforced—Bank is not prohibited from taking security for advances—S. 37 is directory and not mandatory—Acts in contravention are not void *ab initio*.

The action of the Directors in taking the security to cover future advances, although it may be in excess of their powers, is not void *ab initio*. It is open to the Bank to have accepted such contract.

[P. 12, C. 2.]

If a prohibition is in the interest of the share-holders and is based on considerations of public policy it must be regarded as *malum prohibitum*.

[P. 12, C. 2.]

Under the Presidency Banks Act it is not the Bank that is prohibited from taking security in regard to future advances in the shape of immoveable property, but only the Directors. S. 37 only contains instructions to the Directors as to how they should manage the business of banking.

[P. 13, C. 1.]

It is well settled that where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transaction void altogether. S. 37 is only directory of the powers of the Directors.

[P. 13, C. 1.]

K. P. Madhava Rao, B. Sitarama Rao and *K. P. Lakshmana Rao*—for Appellant.

K. N. Aiya—for Respondents.

Judgment.—The defendants Nos. 1 to 4, the father of defendants Nos. 4 to 6 and the 6th defendant executed to the Bank, the 12th defendant in this case, a deed of mortgage (Exhibit E) on the 5th August 1898. The property was to be regarded as security for a sum of Rs. 54,000—already advanced to the defendants, and "for other credits and advances" which may be made to them from time to time. Payments were made towards the debt. On the 2nd June 1905 the Bank transferred the balance due to it from the defendants to the plaintiff under Exhibit A. The plaintiff sued under the assignment. The defendants admitted the execution of Exhibit E, but pleaded payment in full before the date of the transfer. There were subsidiary pleas of limitation with reference to portions of the claim. The defendants also contended that the document, Exhibit E, cannot be sued upon, as it was made to secure future advances. The Subordinate Judge came to the conclusion that the claim was based upon an invalid document, and dismissed the plaintiff's suit.

In appeal it has not been argued by the appellant that the Directors had power under the Presidency Banks Act, XI of 1876, to take a security upon immoveable property or in respect of future advances, as it was not necessary for the disposal of the appeal. The main contention pressed before us was that the limitations on the powers of the Directors only affected the relationship *inter se* between them and the Bank and that even if the Directors exceeded their powers, the transaction entered into by them would not be illegal. S. 36 of Act XI of 1876 defines the scope of banking transactions and enumerates the various powers conferred upon a Bank. S. 37 deals with the duties of the Directors of the Bank. In our opinion S. 37 must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors act in disregard of

those powers, they render themselves liable to the Bank for any loss it may sustain by the unauthorised acts. That section does not enable third parties with whom contracts have been entered into to deny their liability to the Bank, if the Bank chooses to act upon the contract of its Directors. In a very elaborate judgment Mr. Justice Russell in *Turner* v. *Bank of Bombay* (1) points out that the action of the Director under such circumstances will not be *malum prohibitum*. On appeal Sir Lawrence Jenkins, C. J., and Tyabji, J., accepted this view. We are of the same opinion, Mr. Aiya Ayyar referred to Ss. 7 and 24 of the Act and contended that the Directors are identical with the Bank and that if there is a prohibition against the Directors it is also a prohibition against the Bank. We are unable to agree with this contention. As pointed out in Buckley on Companies (9th Edition) page 626, "the Directors of a Company fill a double character. There are (*i*) agents of the Company, and (*ii*) trustees for the share-holders of the powers committed to them." It is this dual capacity that is recognized throughout the Indian Act. If an agent exceeds the authority conferred upon him by the principal, it is open to the principal to adopt it as if the agent acted within the scope of his authority. The party with whom the contract has been entered into is not entitled to repudiate the transaction. Of course if the unauthorised dealing is opposed to public policy, there can be no ratification. In *Great Eastern Railway Company* v. *Turner* (2), Lord Selborne defines the position of Directors thus: "The Directors are the mere trustees or agents of the Company—trustees of the Company's money and property, agents in the transactions which they enter into on behalf of the Company," and then he says: "I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public Company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of *cestui que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their money." The reason of the rule is that, whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations. The view enunciated in *Turner* v. *Bank of Bombay* (1) has been applied in Madras to cases arising under the Indian Trusts Act. In *Kadir Ibrahim Rowther* v. *Arunachelam Chettiar* (3), the learned Judges held that where a trustee exceeded his powers in granting a lease, the transaction was only voidable at the option of the *cestui que trust* and was not void altogether. In *Sinaya Pillai* v. *Munisamy Ayyan* (4), where a guardian exceeded the powers given to him by the Guardians and Wards Act, the learned Judges held that his act was only voidable at the option of the ward. We must, therefore, hold that the action of the Directors in taking the security to cover future advances, although it may be in excess of the powers, was not void *ab initio* and that it was open to the Bank to have accepted the contract as concluded by the Directors. Mr. Aiya Aiyar relied very strongly upon the decision in *National Bank of Australasia* v. *Cherry* (5); one essential difference between that decision and the case before us is that in the former the prohibition which was contravened was against the Bank itself and not against the Directors. Lord Cairns, in delivering the judgment of the Judicial Committee, came to the conclusion that as the Bank was prohibited from entering into transactions of a certain class, any contravention of such an express prohibition vitiated the contract altogether. Courts have recognised that if a prohibition is in the interests of the share-holders and is based on considerations of public policy it must be regarded as *malum prohibitum*. *See* per Blackburn, J., at page 379 in *Taylor* v. *Chichester and Midhurst Railway Company* (6). In the present case, the contract does not affect the rights of

(1) (1901) 25 B. 52.
(2) (1873) 8 Ch. App. Cas. 149=42 L. J. Ch. 83.
(3) (1910) 33 Mad. 397=4 I.C. 1082.
(4) (1899) 22 Mad. 289.
(5) (1909) 3 P. C. 299.
(6) (1848) 2 Ex. Cases 356=39 L. J. Ex. 217.

the share-holders nor does it offend public policy. It is not the Bank that is prohibited from taking security (in regard to future advances or in the shape of immoveable property), but only the Directors. Therefore, the decision relied upon by Mr. Aiya Aiyar does not affect the present case. Moreover the Act of 1876, regulating banking transactions in this country was passed after the decision in *National Bank of Australasia* v. *Cherry* (5), and when the Legislature has advisedly not prohibited the Bank but only the Directors by S. 37 from entering into transactions of a particular nature, it is reasonable to hold that the section only contains instructions to the Directors as to how they should manage the business of banking. It is well settled that, where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transaction void altogether. [*Queen* v. *Lofthouse* (7) and *Queen* v. *Ingall* (8).] In our opinion S. 37 is only directory of the powers of the Directors. The parties with whom the contract has been entered into are not entitled to plead that they are absolved from liability, because the transaction is one which the Directors had no power to enter into. Curiously enough the Subordinate Judge quotes *Turner* v. *Bank of Bombay* (1), but entirely misunderstands the decision. We must, therefore, reverse his decision and direct him to take back the case on his file and dispose of it upon the other points arising in the case.

As the decree itself is reversed, it is not necessary to pass separate orders on the memorandum of objections. The costs in this Court of all parties will abide the result and should be provided for in the revised decree.

S. N./R. K.

Appeal allowed ; Decree reversed.

(7) (1841) 1 Q. B. 433=7 B. & S. 447.
(8) (1841) 2 Q. B. 199=46 L.J.M. C. 113.

A. I. R. 1916 Madras (13)

OLDFIELD AND TYABJI, JJ.

Arasalwar Peria Tiruvadi Aiyengar—Plaintiff—Appellant.

v.

Muthammal Janaki—Defendant—Respondent.

Appeal No. 34 of 1914, decided on 3rd December, 1914, against the appellate order of Dist. Judge, Tinnevelly, in Appeal Suit Nos. 271 and 273 of 1913.

(a) Transfer of Property Act (4 of 1882), S. 58—Hypothecation does not bar personal decree.

Where in a document there is a covenant to pay a debt on a particular date, although followed by a direction that in default of payment the sum may be recovered from the hypothecated property, the mortgagee is nevertheless entitled to a personal decree. [29 Mad. 491 Foll.]

[P. 14, C. 1.]

(b) Civil P. C. (5 of 1908), O. 34, R. 6—If suit is filed within 6 years application for personal decree can be made at any time.

An application for a personal decree can be made even after six years from the date of bond, provided the suit is filed within six years from the date of the bond. [P. 14, C. 1.]

M. D. Devadoss—for Appellant.

K. R. Rangaswami Aiyangar—for Respondent.

Facts.—This is an appeal against an order refusing to pass a personal decree under O. 34, R. 6, of the Code of Civil Procedure in a mortgage suit. The appellant is the decree-holder. A decree was passed directing the realization of the mortgage amount from a sale of the hypothecated properties. He brought the *hypotheca* to sale and realized therefrom a sum of Rs. 910. A sum of Rs. 109 still remained due under the decree, and he sought to recover it by attachment and sale of the other properties of mortgagor, and applied, therefore, for a personal decree under O. 34, R. 6. The judgment-debtor at first paid the amount into Court. She afterwards contested the application stating that she, being a woman, was misled into paying the balance of the decree amount into Court and that the decree-holder is not entitled to a personal decree *as the mortgage document* merely provides *for the realization of the amount out of the hypotheca*. The District Munsif applied the amount paid by her into Court towards the decree, and directed satisfaction of the decree to be

entered up. She then appealed to the District Judge, who passed the following order :

"It will be observed that there is a covenant to pay on a particular date accompanied by a mortgage of certain property as security. It is, however, immediately followed by a direction that in default of payment the sum shall be recovered from the mortgaged property.

"It seems to me, therefore, that the covenant to pay was not absolute but qualified, and that the debt could not be recovered otherwise than from the mortgaged property."

He accordingly allowed the appeal and dismissed the application for a personal decree. The present appeal is against that order.

Judgment.—We follow *Abbakke Heggadthi* v. *Kinhiamma Shetty* (1), the terms of document in that case resembling those of the document before us, and dissent from the District Judge's conclusion that the plaintiff was not entitled to a personal decree.

It is then argued by the defendant that the application for a personal decree is made out of time, being more than six years from the date of the suit mortgage. It is not shown that this objection was taken in the lower Appellate Court, and in any case it is sufficient that the plaintiff's suit was in time, the date of its institution, not that of the application for personal decree, being material.

The appeals against Appellate orders are allowed and the lower Appellate Court's decisions are set aside.

The civil miscellaneous second appeals are remanded to the District Munsif for re-admission and disposal according to law after passing a personal decree in plaintiff's favour. Defendant will pay plaintiff's costs throughout.

S.N./R.K.

Appeal allowed ; Petition remanded.

(1) (1906) 29 M. 491.

A. I. R. 1916 Madras 14

SPENCER AND COUTTS-TROTTER, JJ.

Maniyam Kuppanna Gounden and *others*—Defendants—Appellants.

v.

Kuppanna Goundan and *others*—Plaintiffs—Respondents.

Second Appeal Nos. 1644 and 1645 of 1913, decided on 10th March 1915, against the decrees of Sub-Judge, Trichinopoly, in Appeal Suits Nos. 312 and 279 of 1912.

(a) Transfer of Property Act (4 of 1882,) S. 55 (1) (f)—Vendor's duty—Mere executing deed does not discharge—Vendee must be secured in peaceful possession.

Per *Spencer, J.*—It is the duty of every seller of immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey. [P. 15, C. 1.]

(b) Ejectment—Defence — Mere contract of sale with possession is no defence to ejectment—He should sue for specific performance on that contract.

A contract of sale followed by delivery of possession cannot be pleaded in defence to an action for ejectment where there is no registered sale-deed, but the defendant can avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of the suit. [P. 15, C. 2.]

(c) Transfer of Property Act (4 of 1882), S. 55—Registration.

Per *Coutts-Trotter, J.*—A vendor is under no obligation to register the document he had given. [P. 16, C. 1.]

(d) Mesne profits—Basis of claim is implied agreement to pay for use and occupation.

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation.

T. M. Krishnaswami Aiyar—for Appellants.

R. Shadagopachariar—for Respondents.

Spencer, J.—These two appeals arise out of the same transaction. Second Appeal No. 1644 of 1913 is a suit by a purchaser to compel the seller to execute a proper sale-deed for the land which he purchased in 1906 under a sale-deed which was not registered.

The Appellants' main contention is that the verbal agreement between the

parties in October 1909 to execute a fresh sale-deed is not capable of being enforced, as it is devoid of consideration.

It has been found by the Subordinate Judge that over and above the Rs. 200 which formed the consideration for the original sale-deed of 1906, which remained unregistered owing to the sickness of the vendee, Rs. 25 were paid at some date subsequent to the execution of that sale-deed.

This sum will serve as sufficient consideration for the later agreement; but it is argued that the Subordinate Judge's conclusion that this was paid as an inducement to execute a fresh deed was not warranted by the evidence. It is true that plaintiffs' witnesses Nos. 1 and 2 do not in so many words state that the Rs. 25 formed the consideration for the agreement of 1909, but I think that this inference could fairly be drawn, as the Subordinate Judge has drawn it, from the fact that the stamp on Exhibit C, the paper on which the second sale-deed was to be written, was a three rupees stamp, whereas Exhibit A was drawn up on a two rupees stamp which was appropriate for the original consideration of Rs. 200. This fact also indicates that the payment of Rs. 25 described as gratuitous was not intended by the parties to give rise to no obligation, moral or legal, on either side. Moreover, it is the duty of every seller of immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey. Even in the absence of the payment of the additional sum of Rs. 25, I should be prepared to hold that there was consideration for the contract to execute a fresh sale-deed. In this view of the case, it becomes unnecessary to deal further with the questions whether the verbal agreement of 1904 was fully performed and whether its enforcement is now barred by limitation. The appellants' case has no merits, but is an unscrupulous attempt to take advantage of the respondent's failure, owing to the sickness and the death of the original purchaser, to get his sale-deed registered within the time allowed by the Registration Act.

This second appeal must be dismissed with costs.

In Second Appeal No. 1645 of 1913 the seller seeks to treat the purchaser as trespasser, to eject him and to recover mesne profits from him during his occupation. He alleges that no consideration was paid for the sale of 1906 and relies on the fact that the sale-deed was not registered.

In *Kurri Veerareddi* v. *Kurri Bapireddi* (1) the question was considered by a Full Bench whether a contract of sale followed by delivery of possession could, when there was no registered sale-deed, be pleaded in defence to an action for ejectment, and the question was answered in the negative. It was pointed out, however, by two of the learned Judges that the defendant could avoid the difficulty by suing for specific peformance and getting the action in ejectment postponed pending the result of his suit. That is exactly what has been done in this case, and I have no difficulty, therefore, in deciding that the issue of this suit must follow the result of the suit for specific performance and that this second appeal must be dismissed with costs.

Coutts-Trotter, J.—In Second Appeal No. 1644 of 1913, I agree and I only desire to add a few words in deference to the very able argument advanced on behalf of the appellants by Mr. Krishnaswami Aiyar. He very frankly and, in my opinion, very wisely admitted that his clients' case on the facts as found was devoid of merits and rested wholly on contentions of law. That admission makes it only the more incumbent on us to see that full effect is given to his strict legal rights. In order to ascertain what they are, it is necessary to go carefully into the facts of the case. The facts of the case are as follows:—In 1904 there was an agreement by the 1st defendant to sell the lands in dispute to Perianna Gounden, the plaintiffs' predecessor-in-title, for a sum of Rs. 200. Possession was given under that contract to the purchaser and the 1st defendant has been out of possession ever since. The purchase price was paid and a sale-deed was executed on the 2nd October 1906. That document was handed to the pur-

(1) (1906) 29 Mad. 336=16 M. L. J. 395=1 M. L. T. 153 (F.B.)

chaser, but for reasons which are now immaterial, it was never registered according to law. It was argued for the appellants that the transaction was then complete and that the 1st defendant had done all that was required of him and that Rs. 200, which was the consideration for that transaction, was exhausted by it and could not be further pleaded in aid to support any later transaction. With those contentions I agree. I do not think the vendor was under any obligation to register the document which he had given and if the matter stopped there, I think the plaintiff's suit would fail on the grounds that he had no legal title perfected by registration and that any suit to enforce that contract would be barred by limitation. But the matter did not stop there. It is clear that at some time or other between October 1906 and October 1909, the 1st defendant promised to execute a new sale-deed so as to make good the title of the purchaser. It is said that for that agreement there was no consideration and that in so far as the lower Court has purported to find that there was consideration, that finding is unsupported by any evidence.

Now the last date for registration of the original sale-deed (Exhibit A) was March 1907 and Perianna Gounden, the original purchaser died in October 1907. At some period before his death Perianna Gounden unquestionably paid the 1st defendant a further sum of Rs. 25. An expression is used which is said to indicate that that was a gift; but I do not think that that expression can be pressed to mean more than this: that it was a payment which he regarded as being one that he was under no moral obligation to make or do. I think on the known facts of the case there was no moral obligation on him to pay it. In October 1909 a stamp for Rs. 3 was purchased, it is not material by whom, out of moneys provided by the plaintiffs and that stamp would be the requisite stamp on a sale for consideration of Rs. 225. Now on that the learned Judge in the lower Appellate Court came to the following conclusions which are to be found on page 17 of the printed pleadings paper. He says thus:—"If the paper, that is, the stamp, was purchased in accordance with the agreement of October 1909, there would appear to be no reason to doubt that the 1st defendant himself purchased it." That I think is an indication that he was prepared to find that the stamp was purchased in accordance with the new agreement. He goes on: "There is also evidence that as an inducement to 1st defendant to execute a fresh sale-deed he was even paid an extra sum of Rs. 25 over and above the price of Rs. 200 already paid. This extra sum of Rs. 25 was obviously intended as a consideration for the fresh agreement and it is probable, therefore, that as it did not form part of the original agreement it was not considered necessary to mention it, either in the plaint or in the criminal proceedings. That a stamp paper of the value of Rs. 3 was purchased lends some support to this payment of Rs. 25 and probably the parties intended to bring about a sale-deed for Rs. 225." Now it is said that that finding is unsupported by the evidence, I therefore, turn to what the evidence in regard to that matter is. We find it in the depositions of two on behalf of the plaintiffs' witness No. 1 and witness No. 8 for the plaintiffs. Plaintiffs' witness No. 1 says this: "As the time for registration was over, I asked 1st defendant to buy a fresh stamp paper for Rs. 3 and gave him Rs. 3 and he bought a stamp paper and gave it to us; he gave us this stamp. My brother's wife paid Rs. 3 to 1st defendant. We agreed to pay him Rs. 25 in excess as a present (that is the translation of the *Tamil* word '*enamaga*') and my brother paid him Rs. 25, it appears. As we refused to sell some other property to 1st defendant and sold it to a *parian* as previously agreed, he refused to execute a fresh sale-deed." And plaintiffs' witness No. 8 on page 34 of the printed documents paper says this: "Then 1st defendant agreed to execute a fresh sale-deed in respect of the plaint lands on our advising him to do so, and so Muthammal paid me Rs. 3 for a stamp-paper and I paid it to 1st defendant;" and then in cross-examination he says, "I was told by my sister that Rs. 25 was paid in addition to Rs. 200 and I said that three rupees stamp must be purchased." I agree with the contention of the learned Pleader for the appellants that this is clearly not evidence, and I do not think we need pay any attention to it in the absence of any means of knowing what question was put to elicit that answer. But it is not difficult from the other evidence to conclude that something of the sort must have happened.

Now reading that evidence, what is the proper inference to be drawn from it? I think the proper inference to be drawn is this: that sometime between March 1909 —before that date there would be no object in paying a further sum of money to get the document registered in accordance with the original agreement—and his death in October 1909 the original purchaser, Perianna Koundan, paid Rs. 25 to the 1st defendant in order to induce him to execute a new document of title and that he agreed to do so; that that agreement remained in force and unexecuted until the purchase of the three rupees stamp was made in October 1909. I think that there was good consideration for that fresh agreement and that the 1st defendant first definitely broke it when he refused to make use of the stamp provided for the purpose and execute a fresh sale-deed in October 1909. I think that the plaintiffs' right to sue on this agreement accrued on that date and that, therefore, the suit which was filed on the 26th July 1910 is not barred by limitation. I, therefore, agree that the appeal fails and must be dismissed with costs.

IN SECOND APPEAL NO. 1645 OF 1913.

With regard to the appeal in the other suit, so far as the claim for possession of the property is concerned, in view of the decision in the earlier suit any relief of that kind at this date would obviously be useless and futile; and, therefore, this appeal resolves itself into a claim for mesne profits in respect of the claim for possession during the period when the purchaser had no legal title to the land. It may be conceded for the purposes of the argument that the appellants were entitled to possession and, therefore, by the Transfer of Property Act, would in the ordinary course be entitled to the rents and profits of the land. That seems to be the effect of the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and though doubts have been cast upon that decision, it is not necessary to question its authority for the purpose of the present case. But a decree for possession would be, as I said, futile; and so the appellants only claim mesne profits. The essence of a claim for mesne profits is this: that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. Now the facts here are quite inconsistent with any such implied obligation at all. The appellant knew perfectly well the exact relation between himself and the person to whom he had agreed to sell the land. He knew that he was under a moral obligation not only to allow him to have possession, but to perfect his title to that possession by the execution of the necessary documents, and I think it is impossible to say that, such being the circumstances under which the possession was taken, there was an implied agreement between them that he should pay mesne profits in respect of an occupation to which, to the knowledge of both the parties, he was clearly morally entitled and only required the formal execution of a document.

I think that this appeal also fails and should be dismissed with costs.

S.N./R.K.

Appeals dismissed.

A. I. R. 1916 Madras 17

BAKEWELL, J.

Kunthalammal—Plaintiff.

v.

P. N. K. Suryaprakasaroya Mudaliar and *others*—Defendants.

Original Civil Suit No. 274 of 1914, decided on 1st October, 1915.

(a) Will—Construction—Residuary clause for Pooja etc. from balance left after satisfying all bequests and expenses—Fund in deposit in Court unknown to testator—Held it passed to heirs.

Where in a suit for an account of the administration of the estate and for its administration under the orders of the Court, it appeared that the Will after stating the property which the testator intended to dispose of and dividing it up amongst the various beneficiaries, provided that "the sum which may be left after deducting the above mentioned legacies and such other expenses, shall be utilised in my name without defect for *pooja*," etc., but that at the time of making the Will, the testator did not know that there was a fund in Court to his credit:

Held, that this fund did not pass under the Will of the deceased but went to the heirs as on an intestacy. [P. 18, C. 1 & 2.]

(b) Contract Act (9 of 1872), S. 20—Release of claim under mistake is not binding.

That a release of all his claim against the estate executed by the plaintiff under a mutual mistake was not binding on him. [P. 18, C. 2.]

C. P. Ramaswami Aiyar and *A. Durasami Aiyar*—for Plaintiff.

P. Sambandam and *N. Chandrasekhara Aiyar*—for Defendants.

Judgment.—One Dakshinamurthi Mudaliar was entitled to certain moneys in this Court under decree in Suit No. 45 of 1889. By an order in that suit, dated the 27th March 1893, certain moneys amounting to Rs. 4,056-12-3 were directed to be transferred by the Registrar to the Accountant-General for investment. These moneys represented certain jewels which were found to be part of the inheritance of Dakshinamurthi Mudaliar and not to have passed under the Will of his father. At the date of the decree, Dakshinamurthi Mudaliar was a minor, but having attained his majority he applied, in February 1904, for payment out of the funds in Court; and it appears from Exhibits H and H1, the certificate of funds issued by the Accountant-General, that his application was confined to the moneys specified in that certificate. Owing to some mistake on the part of the legal advisers of the plaintiff in that suit, the moneys in the hands of the Registrar of the Court were not transferred to the Accountant-General in pursuance of the order of the 27th March 1893, and were lost sight of when the application was made by the plaintiff for payment out to him.

This is clearly stated by the present 1st defendant in an affidavit filed by him in that suit on the 8th of August 1914, Exhibit C. In paragraph 8, he states: "It appears that the said sum of Rs. 4,056-12-3 which appears to have remained in the hands of the Registrar of this Honourable Court, was not known to exist and was consequently overlooked and I have now come to know that the said sum of Rs. 4,056-12-3 is standing to the credit of this suit." The amount was accordingly paid out of Court to the 1st defendant, who claimed it as the executor of the Will of Dakshinamurthi Mudaliar.

This Will is dated the 5th December 1905, and the testator died in the same month. The 1st defendant was appointed executor of the Will and has been administering the estate of the deceased, and this suit is brought by the widow of the deceased on behalf of herself and the other legatees under the Will, for an account of the administration of the estate and for its administration under the orders of the Court. The question has arisen as to whether this sum of Rs. 4,000 and odd passed to the residuary legatee under the Will. The Will follows the form, which is very well known in this Court, of first stating the property which the testator intends to dispose of and then dividing it up amongst the various beneficiaries. Clause 2 of the Will reads as follows:—"The house No. 25 in Nattu Pillayar Covil Street and ready money were received (by me) under an order of the High Court according to my adoptive father's Will. Of the amount left deducting the sum spent therefrom, not only is a certain portion lodged in fixed deposit in Arbuthnot's House in my name and in the name of my senior elder brother P. N. K. Suryaprakasaroya Mudaliar, but the remaining sum is in the shape of secured and unsecured debts and ready money." The testator then proceeds to give various specific and pecuniary legacies, and in clause 13, he says: "The sum which may be left after deducting the abovementioned legacies and such other expenses, shall be utilised in my name without defect for *pooja* once, that is, daily, and repairs and other charities for the temple of Sri Vaideswarar in Poonamalle". Having regard to the fact that the existence of this sum of Rs. 4,000 and odd was unknown to the testator at the time, and to the statement made by him that he is dealing with a particular house and the moneys which had been already received by him from the High Court, I think that the words in clause 13 refer to the residue of the moneys in his hands which have not been already disposed of by him under the Will, and that the sum of Rs. 4,000 and odd is not disposed of by him. I may point out that the residuary clause in the form in which it appears in English Wills, is practically unknown to the ordinary testator in Madras and that the rules of construction which have been laid down by English Courts, are not applicable.

The defendant has also pleaded a release by the plaintiffs of all claims against him but it is clear from the evidence that this document was executed by the plaintiff when she was a minor. It is also perfectly clear that it was executed under a mutual mistake and for that reason also it is not binding on the plaintiff.

The plaintiff has called for and put in a book purporting to be an account of the 1st defendant of his administration of the estate. It is not in his affidavit of documents and I think it is obviously a fraudulent concoction. Certain entries which appear in it have been proved, by the evidence called by the plaintiff, to be untrue.

There will, therefore, be a decree declaring that the sum of Rs. 4,056-12-3 did not pass under the Will of the deceased but will go to the plaintiff as on an intestacy, that the estate must be administered by the Court and that the 1st defendant must account from the date of the death of the deceased on the footing of wilful default. The 1st defendant will pay the costs of the suit up to date. The 1st defendant is ordered to pay this sum of Rs. 4,056-12-3 into Court within 10 days.

S.N./R.K.

Suit decreed.

A. I. R. 1916 Madras 19

SANKARAN NAIR, J.

Rangammal—Claimant—Petitioner.

v.

Sevaugan Chetti —Decree-holder—Respondent.

Civil Rev. Petn. No. 531 of 1912, decided on 1st December 1914, against the order of District Munsif, Namakkal, in Execution Appeal No. 482 of 1912.

(a) Civil P. C. (5 of 1908), S. 115—Essential question left undecided—High Court can interfere.

Where a Court has disposed of a case without deciding a question (*e.g.*, the question of possession in a claim case) which under the Code of Civil Procedure it is bound to decide for a proper disposal of the case, the High Court will interfere under S. 115 of the Code. [P. 19, C. 2.]

(b) Civil P. C. (5 of 1908) O. 21, R. 58—Purchase in name of judgment-debtor along with claimant though consideration was paid by objector and possession also with objector—It is fit case for release of attachment.

Where it was found that the properties attached were purchased in the names of the judgment-debtor and the claimant, that the entire purchase-money was paid by the claimant only, and that he had been in sole possession of the properties for the last ten years or more :

Held, that the claimant was entitled to get the properties released from attachment.

[P. 19, C. 2 & P. 20, C. 1.]

T. Narasimha Aiyangar for Petitioner.

K. R. Subramania Sastri—for Respondent.

Judgment —The District Munsif has not found who is in possession of the property. He only assumes that the petitioner's husband was in possession. Without a finding as to who is in possession this matter cannot be disposed of. If the petitioner is in exclusive possession of the property in her own right, she is entitled to get the properties released from attachment. If she is in possession of the property only as a joint tenant or a tenant-in-common, *i.e.*, on her own behalf and on behalf of the judgment-debtor, the decree-holder is entitled to attach and sell the judgment-debtor's interest in the property. With reference to the above observations, the Munsiff will return a finding after taking evidence on the question of possession. Mr. K. R. Subramania Sastri argues that the matter is not one for interference under S. 115 of the Civil Procedure Code. Where the District Munsif has disposed of a case without deciding a question which under the Code of Civil Procedure he is bound to decide for a proper disposal of the case, this Court ought to interfere under S. 115 of the Civil Procedure Code. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

Finding.—The High Court has directed me to submit a finding in this matter on the following question :—

Who is in possession of the attached property, and if the petitioner, whether she is in exclusive possession in her own right, "Or only as a joint tenant or a tenant-in-common."

Evidence was recorded on both sides and on giving it the best consideration I could, I come to the conclusion that the attached properties were in the possession of the petitioner on the date of attachment and that such possession was not exclusive possession, in her own right but only a possession, which, in the circumstances to be referred to below, can amount to one on behalf of the judgment-debtor and as a tenant-in-common with him.

* * *

Judgment.—The properties were originally purchased in the name of the

judgment-debtor, Dorasami Aiyangar, and his nephew, Rajam Aiyangar, the claimant's husband, by a sale-deed, Exhibit H, dated 13th October 1900. A decree-holder of the uncle, Dorasami Aiyangar, attached his interest in April 1912. The claimant seeks to get the properties released from attachment. The District Munsif finds that from a date subsequent to May 1902 and prior to 1903-1904, Rajam Aiyangar, claimant's husband, should have obtained possession and ever since, Rajam Aiyangar and his widow, the claimant, have been in possession. He also finds that the entire purchase-money payable under Exhibit H was paid by Rajam Aiyangar only. But he holds that as there was no registered instrument of sale by Dorasami Aiyangar in favour of the husband, she should, be held to be only a tenant-in-common with Dorasami Aiyangar though in possession of the entire properties. On the facts found by the District Munsif the claimant is entitled to have the properties released from attachment. She is as a fact in sole possession in her own right. I accordingly reverse the order of the lower Court, direct the attachment to be raised and the properties released from attachment. The petitioner is entitled to the costs in this Court, including the costs of the fresh inquiry. The parties will bear their own costs in the lower Court.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 20 (1)

SPENCER AND NAPIER, JJ.

Thikkillath Tarawad Karanavan and *another*—Plaintiffs—Appellants.

v.

Vadakka Chathibikath Manchu Nair and others—Defendants—Respondents.

Second Appeal No. 26 of 1914, decided on 7th December 1914, from the decree of Sub-Judge, South Malabar in Appeal Suit No. 462 of 1913.

(a) Landlord and Tenant—Forfeiture—Denial of landlord's title is not sufficient.

The mere denial of the landlord's title will not work a forfeiture of that tenancy. [P. 20, C. 2.]

(b) Malabar Law—Land Tenure—In Kudima Jenmam demises tenant can be ejected only if he omits to perform services.

A landlord's power to recover the land and to oust the tenant in *kudima jenmam* demises, is limited to cases in which the tenant omits to perform the services for the performance of which the grant was made. [P. 20, C. 2.]

A. S. Venku Aiyar for T. R. Ramachandra Iyer and *T. R. Krishnaswami Iyer*—for Appellant.

C. V. Anantakrishna Iyer and *T. K. Govinda Aiyer*—for Respondents.

Judgment.—The plaintiff sought to eject the defendants on the ground that their assertion of *jenmam* right in two deeds one of partition and one of mortgage worked a forfeiture. In Second Appeal No. 987 of 1904 Benson and Wallis, JJ., agreeing with the District Judge of North Malabar held that a landlord's power to recover the land and to oust the tenant in *kudima jenmam*, demises is limited to cases in which the tenant omits to perform the services for the performance of which the grant was made. This view is in accordance, with the description given of this form of tenure in Chapter 13 of Moore's Malabar Law. We think that the plaintiff has failed to make out that he had a right to eject the defendants by virtue of their denial, if any. A further point has been taken that Exhibit V on which the defendants rely for proving that their tenure was of the species called *adima jenmam* or *kudima jenmam* was not genuine, but its genuineness was evidently not disputed in the District Munsiff's Court.

The appeal fails and is dismissed with costs of the 5th and 6th defendants.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 20 (2)

SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Raja of Karvetnagar—Petitioner—Appellant.

v.

Venkata Reddi and *others*—Defendants—Respondents.

Appeal Nos. 286 to 290 of 1913, decided on 1st April 1915, against the orders of Dist. Judge of North Arcot, dated 25th January 1913, in Civil Misc. Petn. Nos. 898 to 901 and 904 of 1912.

(a) Civil P. C. (5 of 1908), S. 47—Right of appeal under S. 47 cannot be taken away by implication.

A party to whom a right of appeal is given, if he comes under S. 47, should not be deprived of it unless the Civil Procedure Code expressly denies it to him. [P. 22, C. 1]

(b) Civil P. C. (5 of 1908), S. 73—Order under S. 73 is appealable if it affects parties to suit specially judgment-debtor.

Orders passed under S. 73 are appealable if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by clause (2) of S. 73. [P. 21, C. 2 & P. 22 C. 1.]

18 All. 410, 18 Mad. 13; 26 Mad. 501; 20 I. C. 790 Foll. 36 Cal. 130; 14 All. 210; 42 Cal. 1; A.I.R. 1914 Mad. 437 Dist.

(c) Civil P. C. (5 of 1908), S. 73 and O. 34, R. 6—Personal decrees under R. 6 are money decrees for purpose of S. 73—Mortgagee can apply for rateable distribution.

Mortgage-decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor, are decrees "*for the payment of money*" within the meaning of S. 73 of the Code and entitle the mortgagee to apply for rateable distribution under that section. [P. 22, C. 2]

28 Mad. 224 and 27 All. 158 Foll.

(d) Civil P. C. (5 of 1908), O. 21, R. 57—Execution applications granted—No further relief asked or granted—Application will be deemed to be pending unless ordered to be dismissed.

Execution applications praying for specific reliefs which were all granted several years before assets were realised and on which no further reliefs could be asked or granted, are still on the file and undisposed of if no final orders have been passed taking them off the file of pending applications. [P. 23, C. 1]

(e) Madras High Court Rules—R. 167—R. 167 contemplates final order after sale of property.

Rule 167 of the Civil Rules of Practice, Madras, contemplates final orders being passed by the Court on a petition after the sale has been confirmed. [P. 23, C. 1.]

(f) Execution—Decree binding—Executing court cannot go behind decree.

An objection that the decrees passed are not in accordance with law, cannot be raised in execution proceedings. [P. 22, C. 2.]

L. A. Govindaraghava Aiyar—for Appellant.

M. Krishnamachariar, V. Parthasarathy Aiyangar and *P. Venkataramana Rao*—for Respondents.

Judgment.—The respondents in these connected appeals obtained mortgage-decrees against the appellant. These decrees provided for the recovery of the balance from the person and the other properties of the judgment-debtor. Certain properties, not included in the mortgage to the respondents, were attached in execution of two other decrees against the same judgment-debtor; the realised assets were paid into Court. The present respondents applied for rateable distribution; notwithstanding the objection of the judgment-debtor, the applications were granted. The judgment-debtor has appealed. A preliminary objection is taken that as the order was passed under S. 73 of the Code of Civil Procedure, against which no appeal is provided by S. 104 of the Code, no appeal should be entertained. It is conceded that the question agitated in those applications *relates* to the execution of the decrees between the parties to the suits in which the decrees were passed. *Prima facie*, therefore, the order is appealable as falling under S. 47 of the Code of Civil Procedure. Has that right of appeal been taken away in the present case by S. 73? That section does not say that no appeal shall lie against orders passed under it. It is by the omission to provide for an appeal in S. 104 that it is argued that an appeal is not given against the order. It has been held with reference to orders passed under O. 21, R. 63, that if the adjudication was between the parties to the suit, although the matter may arise in a claim petition, an appeal will lie under S. 47 of the Code of Civil Procedure. This principle was recognised both under the old and the new Codes: See *Sundar Singh* v. *Ghasi* (1), *Krishnabhupati Devu* v. *Vikrama Devu* (2), *Vengappayyan* v. *Karimpanakal Parvati* (3), and *Kali Prosanna Ghosh* v. *Golam Rahman* (4). On the analogy of these decisions, we are of opinion that orders passed under S. 73 of the Code of Civil Procedure are appealable, if they affect parties to the suit. In *Jagadish Chandra Shaha* v. *Kirpa Nath Shaha* (5), *Kashi Ram* v. *Mani Ram* (6), the contest was between rival decree-holders. They are not governed by S. 47 of the Code of Civil Procedure. This distinction was pointedly referred to in *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (7).

But our attention was drawn to the judgment of Sankaran Nair and Ayling, JJ., in *Pungalur Chennamma* v. *Raja of*

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(1) (1896) 18 All. 410.
(2) (1895) 18 Mad. 13.
(3) (1903) 26 Mad 501.
(4) A. I. R. 1914 Cal. 321=20 I.C. 790.
(5) (1909) 36 Cal. 130=1 I C. 783.
(6) (1892) 14 All. 210=(1892) A. W. N. 56.
(7) (1915) 42 Cal. 1=27 I. C. 644.

Karvetnagar (8), which at first sight appeared to be a direct authority in favour of the respondents. In that case, the appellant was one of the decree-holders. To him the provision of clause (2) of S. 73 of the Code of Civil Procedure will apply, and he can have his remedy by way of suit if the order goes against him. The judgment-debtor cannot avail himself of the right of suit which that sub-clause provides. The present case may be distinguished from the case in *Rungalur Chennamma* v. *Raja of Karvetnagar* (8) on that ground. We think that a party to whom a right of appeal is given, if he comes under S. 47 of the Code of Civil Procedure, should not be deprived of it, unless the Civil Procedure Code expressly denies it to him. As we find no such denial in S. 73 of the Civil Procedure Code, we must hold that an appeal lies. We overrule—the preliminary objection.

The appeals then coming on for hearing on merits on the same day (19th March 1915) and having stood over for consideration till this day (1st April 1915), the Court delivered the following.

Seshagiri Aiyar, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I entirely agree with his conclusions. The respondents are entitled to rateable distribution even though their decrees are on mortgages. The order for payment of the amount from the person and the other properties of the judgment-debtor was also obtained in these cases. See *Abdulla Sahib* v. *Doctor Oosman Sahib* (9) and *Gatti Lal* v. *Bir Bahadur Sahi* (10). It is not disputed that no formal order was passed disposing of their execution applications. Under the old Code of Civil Procedure Code, it was held that even when an application was "struck off", it must be taken to be still pending, as the law provided no procedure for taking such a step *Sasivarna Tevar* v. *Arulanandam Pillai* (11). In the present Code, there is an express provision for dismissing an execution application where no further step is taken by the decree-holder. It is clear, therefore, that until that step is taken under the new Code, the application is on the file of the Court. The fact that the decree-holder moved the Court only for a particular remedy open to him, cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt. The District Judge is right in treating the applications of the respondents as pending at the time that the claim for rateable distribution arose. These appeals must be dismissed with costs: There will be no costs in Civil Miscellaneous Application No. 289.

Kumaraswami Sastri, J.—These are appeals against the orders of the District Judge of North Arcot declaring that the respondents are entitled to rateable distribution out of the sale-proceeds realized in Execution Petitions Nos. 78 of 1905 and 108 of 1906. The respondents obtained mortgage-decrees against the appellant, which directed that the judgment-debtors should be personally liable for any deficiency that may arise after the sale of the mortgaged properties and the application of the sale-proceeds towards the amount due on the decrees. Though the decrees were not in accordance with the provisions of the Transfer of Property Act, the irregularity cannot be questioned in execution proceedings. *Raja of Kalahasti* v. *Venkata Perumal Raja* (12). The respondents had, therefore, decrees for money and would be entitled to rateable distribution, if they had applied for execution and their applications were still undisposed of and on the file at the date when assets were realized in execution of the decrees in Execution Petitions Nos. 78 of 1905 and 108 of 1906. *Tiruchittambala Chetti* v. *Seshayyangar* (13).

The respondents in 1905 filed execution applications on the decrees obtained by them, which prayed for (1) issue of notices to the judgment-debtors under S. 248 of the old Civil Procedure Code, and (2) sale of the mortgaged properties, leave being given to the decree-holders to bid. Orders were passed granting the reliefs, and it is admitted that the decree-holders obtained all the reliefs they had prayed for. For some reason or other (not explained) no formal orders were

(8) A. I. R. 1914 Mad. 437 = 23 I. C. 422.
(9) (1905) 28 Mad. 224.
(10) (1905) 27 All. 158.
(11) (1898) 21 Mad. 261.

(12) (1911) 12 I.C. 689.
(13) (1882) 4 M. 383.

passed taking the petitions off the file of pending execution applications and the District Judge, treating the applications as pending, ordered rateable distribution on the applications of the decree-holders.

The question for decision is whether execution applications praying for specific reliefs, which were all granted several years before assets were realized and on which no further reliefs could be asked or granted, can be said to be still on the file and undisposed of, because no final orders have been passed taking them off the file of pending applications.

The point is not free from difficulty. When an execution petition is filed, and the Court either rejects all or some of the prayers, it has to pass final orders to that effect. If all or any of the prayers are granted, the decree-holder has to obtain the appropriate reliefs by taking further steps, either on the execution petition or in interlocutory application on the execution petition. When he has obtained all the reliefs he asks for, all that remains to be done on the execution petition is to record the fact that the petition has been disposed of. The Court cannot do anything further. It is argued by Mr. Govindaraghava Aiyar that anything that the Court might do, after all the prayers have been granted and reliefs sought obtained by the decree-holder, will only be purely ministerial and for statistical and not judicial purposes.

There can be little doubt that only a formal order can be passed on the petition after all the reliefs prayed for have been granted and obtained by the decree-holder; but it does not follow that the order is not a judicial order simply because it records that the execution petition has been disposed of. Many purely formal orders are still judicial and not ministerial. The Madras Civil Rules of Practice contemplate final orders being passed on execution petitions. Rule 167 of the Civil Rules of Practice requires that, when orders for sale or passed, the execution petition shall be adjourned to a fixed date and clearly contemplates final orders being passed by the Court on the petition after the sale has been confirmed.

It was the duty of the Court to have fixed a date for the final disposal of the execution petitions, and the fact that it did not do so has the effect of keeping the applications pending till final orders are passed.

I am of opinion that the District Judge was right in treating the execution petitions as pending, and dismiss the appeals (except Civil Miscellaneous Appeal No. 289) with costs.

S.N./R.K.

Appeals dismissed.

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SUNDARA AIYAR AND SADASIVA AIYAR, JJ.

K. Venkatasubbiah and *others*—Plaintiffs and Defendants Nos. 2 to 18—Appellants.

v.

Secretary of State—Defendant No. 1—Respondent.

Second Appeal Nos. 536 to 538 of 1914, decided on 2nd May 1913, from the decree of the Dist. Judge, Nellore in Appeals Nos. 122, 128 and 136 of 1909.

Madras Irrigation Cess Act (7 of 1865), S. 1—Grant of fixed quantity of water by Government for or without consideration for any use that may be made—Presumption is that it is free grant.

Where for some consideration or other or without consideration, a grant is made by the Government of a particular quantity of water or a certain definite fraction of the water of a tank to a person irrespective of the use he might make of it, the proper presumption is that it is a free grant without claim to any kind of payment for the water. [P. 25, C. 1.]

P. Nagabhushanam—for Appellants.

L. A. Govindaraghava Aiyar—for the Crown.

Judgment.—We observe that in the judgment of the District Munsif reference is made to the judgments in Original Suit No. 211 of 1894 and in the appeal therefrom as furnishing important evidence that the plaintiffs are entitled to a fourth of the water in the Anumakonda Tank. In that suit the plaintiffs claimed certain reliefs on the basis of their right to a fourth of the water of the Anumakonda Tank. The Secretary of State for India in Council was the first defendant in the suit. The reliefs were claimed against him and the second defendant therein. The Secretary of State for India in Council admitted that the plaintiffs and their co-sharers were entitled to the use

of a fourth of the water flowing into the Brahmanakraka Anumakonda Tank. He denied the right to the reliefs claimed in that suit, on the ground that the admitted right of the plaintiffs had not been infringed. The plaintiffs in the suit obtained a decree. The right to the use of the one-fourth of the water was the basis of the judgment in that case. If the effect of that judgment be that the plaintiffs were absolutely entitled to the use of a fourth of the water of the tank, irrespective of the use they made of it, it is possible that that judgment may make the question, raised in the present suit, of the plaintiffs' absolute right to one-fourth of the water *res judicata*. We do not wish to decide this matter now, as no issue was framed on the question apparently because the plaintiffs did not put forward that judgment as constituting the matter in dispute here *res judicata*. We think it desirable that an issue should be framed to try the question. We accordingly frame the following issue :— "Is the question of the plaintiffs' absolute right to one-fourth of the water of the Anumakonda Tank without liability to pay any water-cess *res judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal No. 171 of 1896 (Exhibits C, Q and E)." Both parties may adduce any evidence they may be advised to on this issue. The finding should be submitted within two months from the date of receipt of this order in the lower Court.

Seven days will be allowed for filing objections.

The second appeals coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following:

Sundara Aiyar, J.—The District Judge has found that in Original Suit No. 211 of 1894 the plaintiffs' right to one-fourth of the water flowing through Yellareddi Kalva into the Anumakondapallem Tank was established ; but he has held that the question of the plaintiffs' liability for the payment of the water-tax complained of in this suit is not barred as *res judicata*. He is, no doubt, right in saying that in Original Suit No 211 of 1894 the liability of the plaintiffs to pay water-cess was not in question. But their exemption from liability must be held to follow from the right that was established in their favour in that suit. Their claim there was that they were absolutely entitled to a fourth of the water irrespective of the use that they made of it, and not merely to water necessary for irrigating any particular lands belonging to them. They complained of the opening of a vent which affected their right to a fourth of the water of the tank. The Government admitted their right to the use of one-fourth of the water. It was expressly found in that case that the right claimed by the plaintiffs was established, as the plaintiffs proved their immemorial enjoyment of a fourth of the water. A legal origin must be presumed for the exercise of the right claimed by the plaintiffs. The proper presumption is that there was some grant or contract entitling the plaintiffs to a fourth of the water. Mr. Govindaraghava Aiyar contends on behalf of the Government that, even if the plaintiffs' ownership to a fourth of the water be held to be proved, that circumstance would not be sufficient to entitle them to claim exemption from the payment of water-cess under Act VII of 1865 as amended. He argues that an engagement between the Government and the plaintiffs entitling them to the exemption must be proved. But if there was a contract or grant by virtue of which the plaintiffs became entitled to a fourth of the water, it would be unreasonable to suppose that the Government would still be entitled to levy a cess as remuneration for the water, the right to which had already become vested in the plaintiffs before the enactment of the Water-cess Act. The cess imposed under Act VII of 1865 was intended to compensate the Government for the use by holders of land of water belonging to it, or conserved by works constructed by it by empowering them to levy a remuneration from those using the water for irrigation ; where such remuneration is otherwise paid by the landholder, that would be sufficient to establish an engagement of the kind referred to in the proviso to S. 1 of the Act. Thus, where land in the possession of an owner is classified as wet and wet assessment is levied from him, it is taken that the wet assessment itself includes all payment due to Government for the use of the

water required to irrigate the land, and this constitutes an engagement which would exempt the owner from the further payment of any cess under Act VII of 1865.

There can be no doubt that, when for some consideration or other, or it may be without consideration, grant is made by the Government of a particular quantity of water or a certain definite fraction of the water of a tank to a person, irrespective of the use he might make of it, the proper presumption is that it is a free grant without claim to any kind of payment for the water. This was the principle adopted in *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (1). In *Secretary of State for India* v. *Swami Nautheswarar* (2), the learned Judges who decided the case held that a grant of water by Government must be taken to mean a grant without any claim for future payment for the water granted. Mr. Govindaraghava Aiyar urges that the actual decision in the last case is in his favour. But this argument cannot be accepted. There it was held that, when a portion of a *taruvai* belonging to a proprietor received water from a Government source, the mere fact that he was entitled to all the water that flowed to his portion of the *taruvai* after it reached it without obstruction by any one would not entitle him to exemption from the payment of cess for the water which was found to have been derived from a Government source. There was no grant of the water which flowed into his portion of the *taruvai*. His right was merely to the free flow of water to the *taruvai* without obstruction. It must, therefore, be held that the plaintiffs' right to a fourth of the water established in the previous litigation entitles the plaintiffs to exemption from payment of water-cess. The decree of the District Judge must be reversed and that of the District Munsif restored with costs here and in the lower Appellate Court. The Government will make the payment directed under this decree within four months from this date. Second Appeals Nos. 507 and 538 follow. The memoranda of objections are dismissed.

Sadasiva Aiyar, J.—From a perusal of the order of remand, I am of opinion that it was assumed on that occasion that, if the judgment in Original Suit No. 211 of 1894 decided that the plaintiffs were entitled absolutely to the use of a fourth of the water of the plaint tank of Anumakonda, it carried with it an exemption from liability to pay any water-cess to Government for the use of that water. The order contains the following sentences: "If the effect of that judgment" (*i.e.*, the judgment in Original Suit No. 211 of 1894) "be that the plaintiffs were absolutely entitled to the use of a fourth of the water of the tank, irrespective of the use they made of it, is possible that that judgment may make the question, raised in the present suit, of the plaintiff's absolute right to one-fourth of the water *res judicata*. We do not wish to decide this matter now, as no issue was framed on the question apparently because the plaintiffs did not put forward that judgment as constituting the matter in dispute here *res judicata*. We think it desirable that an issue should be framed to try the question. We accordingly frame the following issue:—"Is the question of the plaintiff's *absolute right* to one-fourth of the water of the Anumakonda tank *without liability to pay any water-cess res judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal Suit No. 171 of 1896 (Exhibits C. Q. and E).'" I am, holding the above view as to what we intended in the order of remand, inclined to hold that Mr. Govindaraghava Aiyar is not entitled to argue that, even if the former judgment established the absolute right of the plaintiffs to the ownership of a fourth of the water, it did not also establish any right to exemption from liability to pay water-cess for that one-fourth of the water. Assuming, however, that he is entitled to argue that question, my mind is clear that the Government is not entitled to charge water-cess for the use of the water which does not belong to it. Mr. Govindaraghava Aiyar, however, with his usual subtlety of argument, contended that the decision in *Secretary of State for India* v. *Swami Nautheswarar* (2) and the words of S. 1 of Act VII of 1865 gave the Government the right to charge water-cess even for the use of the water which belongs to the plaintiffs. I do not mean to deny

(1) (1904) 14 M. L. J. 350.
(2) (1910) 34 Mad. 21=6 I. C. 199.

that the Government by Act 7 of 1865 in its amended form took the power to charge water-cess in some instances for water which, according to the ordinary principles of jurisprudence, might be held to belong to a landowner or *ryot*, provided it had belonged to the Government and it became the landowner's water only through a technical rule of law. When water of one land percolates or overflows into another land, the water so collected becomes (according to the technical rules of law) the property of the owner of the land into which it has so percolated or over which it has flowed. The Government thought that, when their water so percolated or overflowed, it was hard upon Government to lose the right to tax the use of such water, simply because they were unable owing to natural difficulties to retain their water or regulate the distribution of their water as they wished. It was considered that, as the ownership in such water had passed to the *ryot* or landholder (into whose land the water had percolated) through no fault of Government, it was inequitable to deprive Government of the right to collect the cess for the use of such water by the lucky man into whose land it had gone. But to extend this extraordinary power of taxing another man's water to cases where the water admittedly belongs to the landowner, *not on account of its having been Government water which percolated or overflowed against the will of the Government into the land of the ryot*, but belongs to him absolutely by grant, or agreement or engagement (express or implied) is not only patently inequitable but, I think, is against the clear intention of the Legislature and of the Government; and I do not think that the words of the Act constrain us to hold that the Government is entitled to levy such an inequitable assessments.

As regards *Secretary of State for India* v. *Swami Nautheswarar* (2), I find after looking through the printed papers that in that case the water of the *taruvai* (swampish water spread) which was in question, was not intended for irrigation purposes at all. The sheet of water in that case was formed of drainage surplus waters and the right of fishery in that tank belonged in the proportion of three-fifths and two-fifths to the Government and the landholder respectively. In such a case, the water belonged to Government, as the whole of it first flowed over the three-fifths area belonging to the Government and only then passed on to the landholder's two-fifths area and even though a portion of the water afterwards so spread over the two-fifths of the area which belonged to the *inamdar* and would have become his property according to the ordinary principles of jurisprudence, the right of the Government to levy a cess for the use of that water which came upon the *inamdar's* land after passing through Government land was preserved or rather created by the Statute; and it was held that that right could not be taken away by the mere fact that Government water (consisting of extraordinary flood water flowing through a Government channel) had so afterwards come upon the land of the *inamdar* or landholder or become mixed up with the water that belonged to him. Without questioning the correctness of the decision in *Secretary of State for India* v. *Swami Nautheswarar* (2), I must say that I am not prepared to go one inch beyond the rule laid down in that case, as I am of opinion that it is impossible to give a wider right to Government on the most favourable construction which can be placed on the words of the Act in favour of the Government.

In the present case one-fourth of the water of the tank absolutely belongs to the landholder by reason of the finding in the former suit and such one-fourth share is not proved to have ever belonged to Government, and I, therefore, hold that water could not be taxed under the provisions of Act VII of 1865 unless it had belonged to Government and had ceased to belong to it owing to its having percolated or overflowed into the land of the landholder. In other words, the water must have been the water of the Government before it ceased to be such through the percolation or overflowing or through its discharge into the landholder's land or tank, etc. I, therefore, agree with the decree that is proposed to be passed by my learned brother.

Second Appeals Nos. 537 and 538 follow. The memoranda of objections are dismissed.

S.N./R.K.

Appeals allowed.

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A. I. R. 1916 Madras 27

SANKARAN NAIR AND OLDFIELD, JJ.

Venkata Mahipaty Gangadhara Rama Rao—Plaintiff—Appellant.

v.

Rajah of Pittapur—Defendant—Respondent.

Civil Appeal Nos. 141 and 142 of 1912, decided on 19th March 1915, against the decree of Temporary Sub-Judge, Rajahmundry, in O. S. No. 19 of 1911.

(a) Hindu Law—Impartible Estate—Zemindary of Pittapur is impartible.

The *Zemindary* of Pittapur is an impartible estate governed by the *Mithakshara* law and descending by lineal primogeniture. [P. 27, C. 2.]

(b) Hindu Law—Impartible Estate—Adopted son's suit for possession of zemindary on ground of invalidity of will and defendant not being natural son of zemindar dismissed—Adopted son's son suing for maintenance but denying co-parcenary held not entitled.

The plaintiff's father was adopted by the late *zemindar* who by a Will and an agreement gave him a maintenance. On the *zemindar's* death the plaintiff's father sued to recover the *zemindary* on the ground that the Will was invalid and that the defendant was not the Raja's natural son. The Will was upheld and the suit was dismissed. The plaintiff seeking maintenance from the defendant but denying his co-parcenary relationship with the defendant.

Held, that the plaintiff was not entitled to any maintenance. [P. 27, C. 2 & P. 30, C. 2.]

(c) Hindu Law—Impartible Estate—Grant for maintenance—Agreement not expressly providing for heir's maintenance Grant cannot be construed as permanent and hereditary—Grant to be permanent must be unequivocal or followed in practice.

As the agreement with the plaintiff's father for maintenance did not expressly state that it was for the plaintiff's father and his heirs, it could not be construed to have made a permanent provision for the grantee and his descendants. [P. 28, C. 1 & 2.]

Prima facie, a provision for maintenance by a grant of money allowance is temporary. Grants to be construed as permanent provisions must be supported by unambiguous language or by a course of conduct and enjoyment by the grantees descendants for a very long time. [P. 28, C. 2.]

(d) Hindu Law—Impartible Estate—Maintenance—Right of maintenance of minor members rest on their relationship and not on their having any interest by birth—Co-parceners have no interest by birth in impartible property—Where relationship is derived no maintenance can be claimed.

Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the *Mitakshara* Law is created by birth, does not exist. The right to maintenance cannot, therefore, be a right which arises out of the co-parcenary interest of the property or which arises out of any community of interest acquired by birth. The right to get maintenance is not evidence of any community of interest which the members of the family acquire by birth. [P. 30, C. 1 & 2.]

A junior member of the family of the holder of an impartible *zemindary* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship and not on account of any interest in the property. [P. 30, C. 2.]

Where the plaintiff bases his claim to maintenance on no relationship, there is no community of interest and the property is not burdened with his maintenance in the hands of a donee. [P. 30, C. 2.]

K. Srinivasa Aiyangar, *A. Krishnasami Iyer* and *A. Suryanarayaniah*—for Appellant.

S. Srinivasa Aiyangar, *P. Narayanamurthy* and *S. V. Padmanatha Iyengar*—for Respondent.

Sankaran Nair, J.—These are appeals from the decree of the Subordinate Judge, Rajahmundry, directing the defendant, the Rajah of Pittapur, to pay to the plaintiff the sum of Rs. 46,250 for maintenance.

The *zemindary* of Pittapur is an impartible estate descending by lineal primogeniture but otherwise governed by the *Mitakshara* Law. The plaintiff's father was adopted by the late *zemindar* who died in the year 1890, having executed a testamentary instrument disposing of all his properties in favour of the defendant, who also claims to be the natural son of the testator. The late Rajah had previously entered into an agreement with the plaintiff's father in 1882, whereby he had agreed to pay him Rs. 1,500 per month and a lump sum of Rs. 6,000 a year. The Will confirmed that arrangement. On the death of the Rajah the plaintiff's father sued to recover the *zemindary*, denying that the defendant was the late Rajah's natural son, and also the validity of the Will. But the suit was finally dismissed by the Judicial Committee on the ground that the Will was valid.

The plaintiff claims maintenance from 1902, when he ceased to be maintained by his father. It will be noticed that the plaintiff does not admit that the defendant is a natural son of the late Rajah and that himself and the defendant are members of an undivided family.

The defendant contended that the plaintiff, a junior member of a family of

the holder of an impartible *zemindary*, is not entitled to any maintenance from the holder, as the *zemindary* is not joint property ; that if it is, on account of the agreement, Exhibit 3, and the Will referred to and also on the ground that the plaintiff does not claim any maintenance as a member of his family, the suit must be dismissed.

The Subordinate Judge decided that the *zemindari* must be treated as joint family property and the plaintiff has got, therefore, legal rights to be maintained out of the *zemindary*. He was also of opinion that such right was independent of, and not derived through, the father.

On the second question, conceding that a Hindu father has the right to represent his descendants in obtaining a provision for himself and his posterity, the Subordinate Judge held that Exhibit 3 was not an arrangement which was intended to include the allowance due to the plaintiff also. He also held that even if the arrangement under Exhibit 3 is held to enure to the benefit of the grantee during his life-time, it was not intended to include within its scope all the descendants of the plaintiff's father even during that limited period. As to the rate of maintenance, he held that Rs. 250 per month *plus* Rs. 53 for house rent would be a " reasonable and respectable " provision, and he accordingly awarded arrears of maintenance at the rate of Rs. 3,000 per annum from August 1904 when the demand was made up to the date of suit. From this decree both parties appeal.

The learned Pleader for the Rajah of Pittapur intimated that though he does not propose to argue before us that the junior member of a *Mitakshara* family is not entitled to maintenance from an impartible *zemindary* in the possession of a member of the family, in view of certain decisions of this Court he reserves his right to argue that question if this case is carried before a higher Court.

We agree with the lower Court that the arrangements made by the late Raja was not a provision made for the maintenance of the plaintiff's father and all his descendants. There is nothing to show that the grantee obtained Exhibit 3 as the head of his branch on behalf of himself and his descendants. There is no reference therein to the heirs or descendants of the grantee. There are no doubt cases where grants have been made making a permanent provision for the maintenance of the grantee and his descendants. See *Lakshmi Narayana Ananga* v. *Durga Madhawa Deo* (1), *Salur Zamindar* v. *Pedda Pakir Raju* (2), *Sri Raja Rau Venkata Kumara Mahipati Surya Rau* v. *Sri Raja Rau Chellayammi Garu* (3). But in all those instances either the language was unambiguous or there existed a course of conduct—that is, enjoyment by a branch for a very long time, which clearly indicated such an intention. *Prima facie*, a provision for maintenance by way of money allowance is temporary. In this case the grantee was the presumptive heir. The plaintiff was not born at that time. No intention can, therefore, be presumed to make a provision for the grantee and his descendants. This point is not seriously urged in appeal.

The *next* question is whether the arrangement and the Will bar the plaintiff's claim. Even if it is not a permanent provision, it was argued that the arrangement is intended to enure for the life-time of the plaintiff's father and that during that period the plaintiff is not entitled to claim any separate maintenance as provision was also made for him in Exhibit 3. It is true that when the arrangement was entered into between the plaintiff's father and the late Raja, in fixing the amount payable to him the fact that the plaintiff's father had also to maintain the plaintiff and his brother who had been born before the date of the arrangement, must have been taken into consideration and the amount must have been settled accordingly. But if the plaintiff is entitled to claim maintenance from the Raja, the amount would naturally vary from time to time. He would, after his marriage in 1904, require a higher amount than in 1882, the date of the agreement.

Exhibit 3, as I have already pointed out, does not describe the plaintiff's father either the managing member of his branch or as the guardian of his children then in existence. In certain cases that the father represented his branch or his

(1) (1893) 16 M. 268=20 I. A. 9=6 Sar. 270 (P. C.)
(2) (1882) 4 Mad. 371.
(3) (1894) 17 Mad. 150.

sons may be presumed, but this is not one of such cases. Neither the plaintiff nor his brother are referred to in the document. It may be open to the defendant to modify the agreement, Exhibit 3, if he has to pay separate maintenance to the plaintiff. But the question cannot affect the plaintiff's right. We disallow this contention.

It was *then* argued that the plaintiff is only entitled to maintenance from the joint family estate and according to the plaintiff's claim he and the defendant are not members of a joint family and he is not entitled to any maintenance out of the estate in the hands of the defendant.

Before the decision of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari* (4), the junior members were held entitled to maintenance on the ground that the impartible *zemindary* was a joint family estate like any other partible estate in which they had co-parcenary interest, with the single exception that it could be held only by one member of the family on account of the impartible character of the holding. Joint family property and co-parcenary property were assumed to be the same under the *Mitakshara* Law. In *Sartaj Kuari* v. *Deoraj Kuari* (4), it was held that the co-parcenary interest which is acquired by a member of a joint family by birth under the *Mitakshara* Law is so connected with the right to partition that it does not exist where there is no right to partition, and that community of interest, therefore, did not exist as partition could not be enforced. At the same time their Lordships stated, that for purposes of maintenance and succession the estate should be treated as joint family estate though there was no such interest in the property as would entitle a member to object to an alienation by the holder for the time being. Subsequent to this decision, the question has been raised in this Court very often, whether the property is not for that reason the sole property of the *zemindar* and the junior members can be said to have any interest in it, so as to entitle them to any maintenance or on their succession to the *zemindary* to deny their liability to pay the debts of their predecessor. The decisions upheld the right of the junior member to maintenance. The ground of decision was that for this purpose they must be taken to be members of a joint family. In the *Udayarpalayam* case (5), the High Court gave a decree for maintenance as the estate was found to be impartible and this decision was confirmed by the Judicial Committee, though the question whether a junior member is entitled to any maintenance does not seem to have been argued before their Lordships. In all the cases decided by this Court or the other Courts in India, in which the junior member's claim for maintenance has been upheld, the right was held to exist on the ground that he was a member of a joint family. According to the plaintiff, the plaintiff and the defendant are not members of a joint family. The plaintiff is not, it is argued, therefore, entitled to any maintenance out of the estate. It is argued, on the other side, that at the time of his birth he was the grandson of the then holder of the estate and his right to maintenance, therefore, cannot be defeated by an alienation subsequently made by that holder in favour of the defendant. Or in other words, it is urged that the sons of the plaintiff's father born subsequent to the vesting of the *zemindary* in the defendant may not be entitled to any maintenance out of the estate; if he had any interest in the *zemindary* before its alienation, then the plaintiff might be entitled to recover it. But the question is, if the plaintiff's claim was only a right to recover maintenance from the holder for the time being and his maintenance was not a charge on the estate, though it may have to be paid out of the incomes of the estate and with reference to it, whether then the plaintiff would be entitled to enforce it against the estate in the hands of an alienee who is not admitted by the plaintiff to belong to his family. Before the decision in *Sartaj Kuari* v. *Deoraj Kuari* (4) the question could not arise. We have, therefore, to consider the grounds of that decision. In that case the High Court of Allahabad laid down the law in the following terms :—" It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term,

(4) (1888) 10 All. 272=15 I. A. 51=5 Sar. 139 (P. C.)

(5) (1901) 24 Mad. 562.

subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership." That is, the High Court decided that the right to maintenance was due to a kind of dormant co-ownership which is subordinated to the title of the individual member to hold the estate. This was the proposition which came before the Judicial Committee for consideration. Referring to the various cases in which an impartible *zemindari* was treated by their Lordships in their previous decisions as common family property or joint family property, the Judicial Committee said that all such statements were only made with reference to the questions then in issue, that is, the right of succession or right to maintenance and they declared the law in these words: "This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the *Mitakshara* Law is created by birth does not exist." It is quite clear that the plaintiff is not, therefore, a co-parcener. They further held that the property in the paternal or ancestral estate acquired by birth under the *Mitakshara* Law is, in their Lordships' opinion, so connected with a right to partition "*that it does not exist where there is no right to it.*" Accordingly the plaintiff has not acquired any interest by birth. The right to maintenance, therefore, cannot be a right which arises out of the co-parcenary interest in the property or which arises out of any community of interest acquired by birth.

The property is, however, joint family property in the sense of the younger brother's taking "such rights and interests in respect of maintenance and possible rights of succession as belong to a junior member of a *raj* or other impartible estate descendible to a single heir." If the impartible *zemindari* is joint family property for purposes of maintenance, is not the right of maintenance, which has been upheld by the decisions of this Court, evidence of community of interest? Their Lordships held otherwise. This appears to be clear from a reference to the Hunsapore case, *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (6) and the *Dayabhaga* Law. Referring the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (6), their Lordships said that though the estate was governed by *Mitakshara* Law and had descended by family usage and custom according to the rule of primogeniture, subject to the burden of making allowances to the junior members of the family for maintenance, yet the right to get maintenance was not evidence of any community of interest which the members of the family acquired by birth. With reference to the *Dayabhaga* Law, they say: "In Bengal there is joint family property, but where property is held by the father as its head, his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot demand a partition. The sons have not ownership while the father is alive and free from defect. Upon his death, the property in the sons arises, and with it a right to partition." (Dayabhaga, Chapter I.) This shows that in the opinion of their Lordships, property may be called *joint family property*, though the junior members may have no ownership in the same at all during the lifetime of the holder for the time being. Their Lordships also point out that the father may alienate the property. The purchaser takes it without any obligation to maintain the sons. That their Lordships use the term 'joint family property' in a peculiar sense, not in the ordinary acceptation of those words, is not a reason for disregarding their opinion. That opinion was necessary to support the conclusion therein arrived at. A junior member of the family of the holder of an impartible *zemindary* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship, and not on account of any interest in the property. The plaintiff does not advance any claim based on relationship; he refuses to admit any relationship. His claim cannot be sustained on that ground. As there was no community of interest, the property is not burdened with his claim in the hands of a donee. In this view the plaintiff's claim fails. We reverse the decree and dismiss the suit with costs throughout.

(6) (1867-69)12 M. I. A. 1=9 W. R. 15 (P. C.)

Oldfield, J.—I have had the advantage of reading my learned brother's judgment and have nothing to add to it as regards Exhibit 3 and the effect on plaintiff's claim of any settlement with his father. There remains the wider question, whether that claim is sustainable by him in virtue of his position as a junior member of the Pittapur family.

As set out in my learned brother's judgment, plaintiff has, for motives which are easily intelligible, refused to rely on any relationship between himself and defendant, the present *zemindar*. Defendant must, therefore, for the purpose of the case be regarded as an alienee of the estate, who acquired it after plaintiff's birth. The questions in general terms are, therefore, whether (1) a junior member of a family has a right to maintenance from an impartible estate held by its head (2), that right is acquired at birth and runs with the estate after its transfer to a stranger.

The learned Pleader for defendant reserved his right to argue the first of these questions elsewhere, if necessary, and confined himself to the second. I understand him by taking that course to have conceded provisionally that the junior member's right existed, but to have admitted nothing as to its nature or basis, which could involve its binding the estate in the hands of an alienee. Plaintiff supported his claim as founded in one way only, on the validity of a proposition which he contended for as settled law, that members of a joint family, whose property is impartible, are entitled to maintenance from that property, in whosoever hands during their lives, because they cannot claim shares in it on division. It is not suggested that this proposition can be supported by any text. It must then be justified either as endorsed by authority or on general principles.

Firstly, as to authority there is no case dealing with a claim against an alienee. Nor in fact is there any, in which the claim against the head of a family was contested directly as founded on principle and the legal rights of junior members of the family in its property were discussed fully for this purpose. For in *Maharana Shri Fatehsangji Jasvatsangji* v. *Kuvar Harisangji* (7), though liability was disputed generally, attention appears to have been confined to the question of the special law applicable to the parties, and the general issue was dealt with shortly by reference to *Muttusawmy* v. *Venkataswara* (8), *Himmatsing* v. *Ganpatsingh* (9). In the first of these decisions the Privy Council was dealing with the case of an illegitimate son and remitted it for determination as to his right against the *zemindary* property; the High Court thereon [*Coomara Yettappa Naikar* v. *Venkateswara Yettia* (10)] treated that right as established by *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (11), which simply recognised the right to maintenance of an illegitimate son; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (12), which referred to the right only incidentally, and *Stree Raja Yanumula Venkayamah* v. *Boochia Venkondora* (13), to which further reference will be made. In the other decision referred to by the Bombay High Court, the plaintiff's claim was no doubt allowed on a ground similar to that relied on here, but without comprehensive discussion or reference to the law, as now understood. In later cases and in this Presidency the right to maintenance has either not been denied on principle, the dispute being confined to its amount, or its existence has been referred to merely incidentally to the discussion of the other characteristics of impartible estates, in particular their inalienability. The *Udayarpalayam* case *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (14) is an instance of the former description; and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati Devastanams* (15) of the latter; and *Baboo Beer Pertab Sahee* v. *Maharaja Rajendar Pertab Sahee* (6) of both. In these circumstances, although the proposition put forward by plaintiff may occasionally have been more or less explicitly stated, it is not possible to hold that it has been sanctioned at any time by authority. Those occasional statements of it occur,

(7) (1896) 20 Bom. 181.

(8) (1867-69) 12 M.I.A. 203=11 W.R. 6 (P.C.)
(9) (1875) 12 B. H. C. R. 94.
(10) (1869-70) 5 M. H. C. R. 405.
(11) (1857-59) 7 M. I. A. 18=4 W. R. 132, (P. C.)
(12) (1862-63) 9 M. I. A. 66=1 W. R. 30 (P.C)
(13) (1869-70) 13 M. I. A. 333=13 W. R. 21 (P.C.)
(14) (1905) 28 Mad. 508=32 I. A. 261 (P. C.)
(15) (1909) 32 Mad. 429= 2 I. C. 18.

it is to be observed, only in the judgments of the High Courts, the Privy Council having never committed itself to any more explicit statement than that contained in *Stree Rajah Yanumula Venkayamah* v. *Boochia Vankondora* (13), where it is said regarding the character of an admitted grant that "these grants by way of maintenance are, in the ordinary course of what is done by a person in the enjoyment of a *raj* or impartible estate, in favour of the junior members of the family, who but for impartibility of the estate would be co-parceners with him." This clearly involves no decision that such grants originate in any principle of law and, an important point, not in custom or even benevolence, the last sentence merely supplying an explanation for them equally consistent with any of these origins. But it is possible that Judges in this country have been led to some extent by this passage to make the more definite statements on which plaintiff relies, and to credit the law in their *obiter dicta* with a symmetry which authority has never recognized directly.

My learned brother has observed that the conception of impartible property and its incidents was altered by the decision in *Sartaj Kuari* v. *Deoraj Kuari* (4) and I may add, in this Presidency by the decision in *Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (16), I concur with him in his conclusion that the right to maintenance does not arise from any co-parcenary interest in the property or any community of interest acquired by birth. As plaintiff's proposition is, in my opinion, inadequately supported by authority prior to these decisions and as its correctness is negatived by them, it is unnecessary to discuss its merits at length. The contention is however in effect, *firstly*, that, because a junior member of a *Mitakshara* family cannot, when the property is impartible, derive advantage from his membership in the ordinary way he is on that account entitled to derive it in another, not ordinarily authorised by Hindu Law. It is, *next*, that he can do so by way of receipt of a maintenance, although the cases in which a right to maintenance is recognised by the texts, are those of illegitimacy or other disqualification personal to the claimant and in no way depend on the nature of the property. Both positions seem to me open to question, and I should in the absence of direct authority hesitate to adopt them.

In these circumstances plaintiff, having failed to show that he acquired a right to maintenance from the impartible estate by birth, must fail. I observe that his claim has been based on his membership of a *Mitakshara* family and his consequent acquisition of a right in its impartible property, and could be dealt with only on that basis. It has not, therefore, been open to us to consider his claim as based on custom, either as regards the Pittapur estate or impartible estates in general in this Presidency, although, if it had been put forward on the latter basis, the instance of recognition of the right to maintenance afforded by the reported decisions might have been important evidence in his favour.

In the result, I concur in my learned brother's judgment, dismissing the suit with costs.

S.N./R.K.

Appeal allowed.

(16) (1899) 22 Mad. 383=26 I. A. 83 (P.C.)

A. I. R. 1916 Madras 32

KUMARASWAMI SASTRI, J.

In re Damodara Naidu and *another*—

Accused—Petitioners.

Criminal Revn. No. 479 of 1915, and Criminal Revn. Petn. No. 381 of 1915, decided on 8th November, 1915, from the judgment of Joint Magistrate, Negapatam, in Criminal Appeal No. 25 of 1915.

(a) Madras Abkari Act (1 of 1886), S. 69, R. 229 — Scope—Rule 229 of Standing Orders does not permit licensee to adulterate arrack so long they keep below the margin allowed for natural causes —R. 229 not being under S. 69 has no force of law.

Rule 229 of the Standing Orders of the Board of Revenue, which directs Abkari Officers to allow wastage in bottling up to 2 per cent. is only a departmental rule for the guidance of its subordinates, the margin of 2 per cent. being fixed as an allowance for evaporation in cases where there is reason to believe that the diminution in strength is due to natural causes. It cannot be construed to mean that licensees can adulterate *arrack* so long as they do not exceed 2 per cent. over the strength mentioned in the permit. [P. 33, C. 1.]

The rule not having been made under S. 69 of the Madras Abkari Act, 1886, has not the force of law and cannot be read as part of the Act. [P. 33, C, 1.]

(b) Madras Abkari Act (1 of 1886), S. 56(b) —Offence under S. 55 is complete as soon as arrack is sold below the strength specified— Court need not take into account technicality of offence.

Under S. 56 (*b*) of the Abkari Act, an offence is committed the moment a person sells *arrack* below the strength specified in the permit, no matter what the cause of the variation may be. The fact that the offence is only technical, is not a matter for the Court, but one for the officers instituting the prosecution. [P. 33, C. 1.]

S. Swaminathan—for Petitioners.

P. R. Grant—for the Government.

Order.—The terms of the license are specific and the privilege extends only to the sale of *arrack* 32 degrees under proof. S. 56, clause (*b*), of the Madras Abkari Act, 1886, renders any person who does any act in breach of the conditions of his license punishable with imprisonment which may extend to three months or with fine extending to Rs. 200 or with both.

The evidence in the case shows clearly that spirits over 32 degrees was sold and the only question is whether rule 229 of the Standing Orders of the Board of Revenue, which directs Abkari Officers to allow wastage in bottling up to 2 per cent., can be pleaded as a defence to a prosecution under S. 56, clause (*b*).

I do not think the rule can be construed to mean that licensees can adulterate *arrack* so long as they do not exceed 2 per cent. over the strength mentioned in the permit. It is only a departmental rule for the guidance of its subordinates and fixes a 2 per cent. margin as an allowance for evaporation in cases where there is reason to believe that the diminution in strength is due to natural causes.

The rule was not made under S. 69 of the Madras Abkari Act and is, therefore, not one having the force of law, or a rule to be read as part of the Act.

Under the Act, an offence is committed the moment a person sells *arrack* below the strength specified in the permit—no matter what the cause of the variation may be. It is true that the offence may be only technical, but this is a matter for the officers instituting the prosecution.

In the present case, both the Joint Magistrate and the Sub-Magistrate have believed the evidence of the Sub-Inspector and I do not think I ought in revision to go behind their findings of fact. The evidence of the Sub-Inspector shows that even the 2 per cent. margin was exceeded when he tested the *arrack*. I see no ground for interfering with the conviction or sentence and dismiss the petition.

S.N./R.K.

Petition dismissed.

A. I. R. 1916 Madras 33

WALLIS AND SADASIVA AIYAR, JJ.

Pasumarti Payidanna—Defendant No. 3—Appellant.

v.

Ganti Lakshminarasamma—*Plaintiff* and *others*—Defendants Nos. 1, 2, 4 & 5—Respondents.

Second Appeal No. 1124 of 1912, decided on 17th April 1914, from the decree of Temporary Sub-Judge, Vizagapatam, in A. S. No. 205 of 1911.

Civil P. C. (5 of 1908), S. 47—Auction sale is not binding and need not be set aside when minor is substituted by fraud as legal representative of deceased judgment-debtor without being properly represented—Where both decree-holder and auction-purchaser are parties to fraud sale can be declared as not binding—Declaratory suit brought within 3 years of attaining majority held not barred—Arts. 12 and 166, Limitation Act being inapplicable—Limitation Act (1908), Arts. 12 and 166.

In a suit for a declaration that the sale in execution of a decree was not binding on the plaintiff, the main objection to the sale was that at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record as the legal representatives of the judgment-debtor, their deceased husband, and at the date of the sale, the plaintiff was a minor, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major, though the 1st defendant decree-holder and the 3rd defendant, the auction-purchaser, both knew that she was a minor. The Court was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down :

Held (1) that the plaintiff, who had no guardian *ad litem* at all, had not been a party to the suit, and that she was entitled to bring the present suit to declare it as not binding on her without regard to the provisions of S. 47 ;

[P. 34, C. 1 & P. 35, C. 2.]

(2) That the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, inasmuch as the other widow also had ceased to have any interest in the estate, the sale was not

binding on the plaintiff, and did not require to be set aside; [P. 35, C. 2.]

(3) That the plaintiff was entitled to a decree as the Court-auction-sale was brought about by the fraud of the decree-holder and Court-auction-purchaser; [P. 36, C. 2.]

(4) that the declaratory suit having been brought within three years of the plaintiff's attainment of majority was not barred, Articles 166 and 12 of the Limitation Act being alike inapplicable. [P. 35, C. 2.]

K. Srinivasa Aiyangar and *V. Ramesam*—for Appellant.

B. N. Sarma—for Respondents.

Wallis, J.—This is a second appeal from the decree of the lower Courts declaring that the sale in execution of the decree in Original Suit No. 559 of 1903 on the file of the District Munsif of Vizagapatam was not binding on the plaintiff. The present plaint was presented as a petition in that suit, but was registered as a plaint in a separate suit under the new provision in S. 47, Civil Procedure Code.

The facts may be briefly stated. The present 1st defendant had obtained decrees against plaintiff's husband in two suits Nos. 555 and 559 of 1903, and after his death his two widows, the plaintiff and the 2nd defendant, were brought on as his legal representatives by the Court of the District Munsif of Rajam, to which the decrees had been transferred for execution. One of the grounds taken by the plaintiff is that the Court to which the decrees had been transferred for execution was not the proper Court to bring on legal representatives of a deceased party, as decided by the Full Bench in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1), and that the order was a nullity. It is, however, unnecessary to consider this point, as the sale has been held not to be binding on another ground. The main objection to the sale is that, as found by the lower Courts, at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record and at the date of the sale on 19th October 1906 the plaintiff was a minor, only attaining her majority in July 1907, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major though, according to the findings, the 1st defendant-decree-holder and the 3rd defendant, the auction-purchaser, both knew she was a minor. The attached properties which were subject to mortgages were first put up for sale by the 1st defendant in execution of his decree in Original Suit No. 555 of 1903 on the 15th October 1906. The properties were put up at Rs. 600 and the sale list, Exhibit H, shows that there were no bidders on the 15th, 16th and 17th and that on the 18th the present 3rd defendant bid Rs. 601. This sale was stopped at the instance, it is said, of the 3rd defendant because certain other decree-holders had applied for rateable distribution in the suit, a matter which was no business of his; and on the following day, the 19th, the 1st defendant applied orally to the District Munsif in the other Suit No. 559 of 1903, and, on the plea that there were no bidders, got the reserve price reduced to Rs. 200, without telling the District Munsif of the sale in Original Suit No. 555 of 1903 and the bid of Rs. 601 by the 3rd defendant. The properties were then put up to sale in Original Suit No. 559 of 1903 and knocked down to the 3rd defendant for Rs. 201.

The Subordinate Judge has found, in my opinion, rightly, that this was a fraud upon the plaintiff. The properties should have been sold in execution of the decree in Original Suit No. 555 of 1903 in which they were first put up for sale, then the 1st defendants, as decree-holder in Original Suit No. 559 could, if so minded, have applied for rateable distribution of the sale proceeds; and the conduct of the 1st defendant and the 3rd defendant in proceeding with the sale in the second suit and getting the reserve price reduced by suppressing from the Court what had happened at the first sale amounted to a fraud upon the plaintiff. This fraud is not without some bearing on the main issue in the case, because, in view of what had happened in the absence of any proper representation of the judgment-debtor, it cannot be said that the plaintiff was not prejudiced by the omission to bring her properly on the record.

The respondent relies on two decisions of the Privy Council in *Khiarajmal* v. *Daim* (2), and *Rashid-un-Nisa* v. *Muha-*

(1) (1905) 28 Mad. 466=15 M.L.J. 110 (F.B.).

(2) (1905) 32 Cal. 296=32 I. A. 23 (P. C.)

mad Ismail Khan (3), to show that the sales are wholly void against the plaintiff because she was not properly represented, while the appellant relies on the decision of the Privy Council in *Malkarjun* v. *Narhari* (4) and on certain observations in *Kadir Mohideen Markkayar* v. *Muthukrishna Ayyar* (5). In my opinion the decision in *Malkarjun* v. *Narhari* (4) has no bearing on the present case. In that case a party who was brought on as legal representative objected that he was not the legal representative, but the Court decided that he was ; and their Lordships held that, in view of this decision which was within the jurisdiction of the Court, the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward. Their Lordships also held that, if the suit could be regarded as one to set aside the sale, it was barred by Article 12 of the Limitation Act.

On the other hand in *Khiarajmal* v. *Daim* (2), one Amirbaksh, a minor, the legal representative of one Naurez, was sued by his guardian one Alahnawaz, who was not his guardian in fact, and had not been appointed his guardian *ad litem*, and the Court held that Court sales in execution of the decrees obtained in these suits were not binding on the estate of the deceased Naurez or the minor, but were without jurisdiction and null and void. In the course of the judgment, their Lordships no doubt say that the absence from the record of one of the legal representatives of a deceased judgment-debtor is not always sufficient reason for disturbing judicial sales which otherwise have been properly conducted. "The Indian Courts," their Lordships say, "have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors." But these observations do not cover such a case as the present in which according to the findings, the other widow who was brought on the record had ceased to have any interest in her husband's estate, and the sale itself was a fraudulent one. An endeavour has been made to distinguish that case from the present, on the ground that the decrees themselves were nullities owing to the minor defendant not having been properly represented, whereas in the present case the decrees were duly obtained against the deceased judgment-debtor. The still more recent decision of their Lordships in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3) shows that there is no substance in this distinction. In that case, as in the present, the suit was brought to declare the nullity as against the plaintiff of certain sales in execution of decrees against a deceased person, in which the minor plaintiff had been brought on as legal representative of the deceased judgment-debtor.

In two instances she had been represented by a woman who, as such, was not qualified to act as guardian *ad litem*, and in the third by another person whose interests were adverse.

Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term. They further held that a minor brought on in this defective manner was not a party to the suit within the meaning of S. 244 - now S. 47, Civil Procedure Code, and did not come within the operation of that section.

It follows from this decision that the minor here, who had no guardian *ad litem* at all, was not a party to the suit in which the sale was made, and that she was entitled to bring the present suit to declare it not binding without regard to the provisions of S. 47, Civil Procedure Code. It follows also from the two decisions last mentioned that the plaintiff, not having been a party to that suit and not having been sufficiently represented by any one who was a party, seeing that the other widow had ceased to have any interest in the estate, the sale was not binding on her, and does not require to be set aside. What has been already said disposes of the question of limitation as the new Article 166 and Article 12 are alike inapplicable, and the suit which was instituted within three years of the plaintiff's attainment of

(3) (1909) 31 All. 572=36 I. A. 168=3 I. C. 864 (P. C.).
(4) (1901) 25 Bom. 337=27 I. A. 216 (P.C.).
(5) (1903) 26 Mad. 230.

majority is not barred. The appeal is dismissed with costs.

Sadasiva Aiyar, J.—The 3rd defendant is the appellant. The plaintiff is the principal respondent. The material facts might be shortly stated thus :—

The plaintiff is the 2nd widow of the judgment-debtor in Original Suit No. 559 of 1903. The decree in that suit was transferred from the Vizianagaram District Munsif's Court to the Rajam District Munsif's Court for execution. The Rajam District Munsif's Court on the application of the decree-holder (the present 1st defendant) allowed execution against the plaintiff (junior widow) and the 2nd defendant (senior widow). Under S. 234 of the old Code (S. 50, cl. 1, of the present Code), it was the Court which passed the decree to which the application by the decree-holder to execute the decree against the widows of the judgment-debtor ought to have been made and it is that Court which ought to have passed the order allowing execution. However, the Rajam District Munsif's Court somehow passed the order.

Another defect in that order was that, while the two widows jointly represented the estate of the deceased judgment-debtor (each of them representing half the said interest) the decree-holder, admitting this fact and knowing that the plaintiff (junior widow) was a minor, represented to the Rajam District Munsif's Court that she was a major, brought her on record as a major, and conducted execution proceedings against her and brought to sale the plaint properties including her moiety of the interest therein as if she was a major. The 3rd defendant purchased the two moieties of the two widows in the Court-auction-sale, he also knowing that she (the plaintiff) was a minor. The purchaser (3rd defendant) and the decree-holder (the 1st defendant) were also guilty of some other fraudulent acts (as found by the lower Appellate Court) in connection with this Court-auction-sale.

The sale took place on 19th October 1906 and it was confirmed on the 23rd January 1907. The present suit was brought on the 13th March 1909 praying for the following reliefs ; (*a*) that the Court-auction-sale of 19th October 1906 may be set aside, (*b*) that it may be declared invalid, (*c*) that such further or other reliefs might be granted, (*d*) that costs might be awarded.

The lower Courts have granted the reliefs prayed for by the plaintiff. I ought to have mentioned that the plaintiff asked for the above reliefs, not by a plaint in a regular suit, but by an application put in under S. 47 of the Civil Procedure Code, which application was converted into a suit by the District Munsif's Court of Rajam.

So far as the merits are concerned, I need only say that on the findings of the lower Appellate Court the plaintiff was entitled to a decree, as the Court-auction-sale was brought about by the fraud of the decree-holder and the Court-auction-purchaser—a fraud having two branches, one directed against the plaintiff, the junior widow of the judgment-debtor, the other directed against the executing Court, which was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down. The plaintiff also relied on the contention that the District Munsif's Court of Rajam had no jurisdiction to allow execution against her as the legal representative of her husband, as that Court was not the Court which passed the decree. Having regard, however, to the decision of Benson and Miller, JJ., in *Thamboo Pillai* v. *Sriramulu Naidu* (6), to the effect that an order of the executing Court allowing execution against the legal representatives of the judgment-debtor is not void, in other words, that the defect of jurisdiction in the executing Court is not such a defect as makes its order wholly ineffectual, I do not think that the plaintiff is entitled to succeed on that technical ground alone.

Another ground on which the plaintiff (respondent) asks us to uphold the decision of the lower Court is that as the plaintiff was not represented by a guardian in the execution proceedings, she was no party at all to the proceedings and the sale thereunder, that it is only a person who was a party to the execution proceedings that is obliged to set them aside and that a per-

(6) (1907) 17 M. L. J. 300.

son in the position of a stranger to the proceedings need only obtain a declaration that the proceedings have not affected her rights. Though the plaintiff also prayed in her plaint for setting aside the sale, that prayer may be treated as a surplusage and the suit may be treated as a mere suit for a declaration of the invalidity of the sale as against the plaintiff's rights in her husband's properties.

In answer to this contention of the plaintiff, the appellant urged that according to the decision of the Privy Council in *Malkarjun* v. *Narhari* (4), the legal representative of a deceased judgment-debtor ought to have the execution sale set aside by proper proceedings, even though he was not made a party to the execution proceedings and even though a wrong party has been joined as such legal representative ; that on similar reasoning, a minor who was brought in as legal representative, but for whom a guardian was not appointed, must also have the sale set aside by proper proceedings and should not be allowed to treat it as invalid as against her without a positive cancellation of the sale and that this rule of law applies *a fortiori* in a case like the present where a co-widow, one of the legal representatives, was a major and was on the record. The rejoinder of plaintiff to this contention of appellant is that though, in the absence of fraud or collusion, where a Court and a decree-holder treat a person who is not the legal representative of the deceased judgment-debtor, as such legal representative or treat one of several legal representatives as the sole legal representative and conduct execution proceedings, such execution proceedings ought first to be set aside by the true legal representative or by those legal representatives who had not been added as such by proper proceedings, yet that rule does not apply to a case where the decree-holder and the Court did purport to bring in the proper legal representative (or one of the proper legal representatives) who was a minor as representing respectively the whole (or a portion) of the estate of the deceased judgment-debtor, but had not put him or her properly on the record by appointing a guardian to act for him or her in the execution proceedings, and that this non-applicability of the rule laid down in *Malkarjun* v. *Narhari* (4) to such a case becomes more pronounced as in this case, it was through the decree-holder's fraud and not through his mere ignorance that the minor legal representative was not represented by a guardian. I think that this contention of the plaintiff in rejoinder ought to be accepted. In the Privy Council case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), not only the *decrees* obtained against a minor without a proper guardian having been appointed for her, but even Court auction-sales held against the interests belonging to a minor legal representative (among the several legal representatives of a deceased judgment-debtor) were treated and declared invalid in the suit brought by the said legal representative. Mr. V. Ramesam, who partly argued the appellant's case with acuteness and persistence, contended that that case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), did not decide that even such a minor legal representative need not have the sale set aside by proper legal proceedings and need only sue for the declaration of the invalidity of the Court-auction-sales as against her interests. I have carefully read through that judgment. In the Court of first instance in that case, the suit seems to have been brought (see the report at page 572) for a declaration that the decrees and sales were invalid and also for the relief that they should be set aside so far as the plaintiff was concerned. Thus, as in the present case, there seem to have been prayers for a declaration of invalidity and also for setting aside. It is not, of course, surprising that plaintiffs in such cases are not clear in their own minds as to whether there is a necessity for a positive cancellation through Court of such sales and decrees or whether mere declaration will do, when learned gentlemen of the Bar are able to put forward plausible arguments for both views. In the present case the plaintiff has been careful to add also a prayer for "further and proper reliefs which the Court may deem fit." In that Privy Council case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), the Subordinate Judge seems to have given both the reliefs (see page 575) which reliefs are, however, spoken of by the reporter as "the relief she" (the plaintiff) "claimed." Their Lordships of the Privy Council do not make any definite pronouncement on the question

whether the sales were *void* as against the plaintiff and need not, therefore, be set aside and whether, therefore, a mere declaration of the invalidity will do or whether they were *only voidable* by the plaintiff as regards her interests and whether, therefore, she should ask in the suit for a relief as to their cancellation. At page 583, their Lordships simply restore the decree of the Subordinate Judge.

While in the case in *Malkarjun* v. *Narhari* (4) the estate of the deceased judgment-debtor could be treated (owing to the wrong order of the Court which had jurisdiction to pass that order) as sufficiently represented in execution proceeding by the wrong legal representative, and hence that the right legal representative should have the sale set aside by taking proper proceedings and could not treat such a sale as completely void, a legal representative who was a minor not represented by a guardian and who could, therefore, not act at all in the proceedings for the protection of the interests of the estate, should be treated as no *party at all to the proceedings*, that the interest in the estate represented by her should also be treated as not put in a position to be legally dealt with by the proceedings in the executing Court and that such a minor legal representative need not bring a suit to have execution proceedings set aside and might properly content herself with a prayer for declaration of the invalidity of the execution proceedings as against her and as against the interests she possessed in the deceased judgment-debtor's estate.

I have to deal finally with the contention that the plaintiff's only remedy was by an application under O. 21, R. 90 (old S. 311), of the Civil Procedure Code to have the execution sale set aside and that that application is barred by limitation as not having been brought within the 30 days allowed for that purpose by Article 166 of the Limitation Act. As I have remarked before in this case, an application was put in by the plaintiff under S. 47 of the Civil Procedure Code and this suit arose out of the transformation of that application into a plaint. Before S. 311 of the Civil Procedure Code was amended and re-enacted as O. 21, R. 90, of the Civil Procedure Code, applications to set aside execution sales for fraud were treated as coming under S. 244, and not under S. 311. By the amended provisions in O. 21, R. 90, an application to set aside an execution sale for fraud was put on the same footing as an application to set aside an execution sale *on the ground of material irregularity*. It seems no doubt hard upon a judgment-debtor whose properties have been sold for a song by the fraud of the decree-holder, that he should be compelled to come in within 30 days though he might not have known of the fraud till after the 30 days had expired. S. 18 of the Limitation Act would not help him in getting an extension of the 30 days unless, after the date of the fraudulent sale, the decree-holder and the purchaser kept him by fraud from the knowledge of his right to make an application, especially where the Court-auction-purchaser has joined the decree-holder in bringing about a fraudulent sale. It does seem a denial of justice to hold that the judgment-debtor should apply within 30 days of the sale to have it set aside, but I do not see my way to get over the plain words of Article 166 of the Limitation Act and I feel myself constrained to hold that if this suit is treated as an application to set aside the sale as distinguished from a suit for a declaration of the invalidity of the sale as against the plaintiff's rights, it must be treated as barred by limitation. So far as the suit is for the declaration of the invalidity of the sale, it is of course not barred by limitation. The decretal portion of the judgment of the District Munsif (see page 15 of the printed pleadings) and the decree of the District Munsif (see page 38) merely give such a declaration and there is no decree directing the sale to be set aside and hence the decree seems to me to be quite correct. As regards those hard cases which I just now referred to, if the fraud was only on the part of the decree-holder and not of the Court-auction-purchaser, I think the Legislature intended that a *bona fide* Court-auction-purchaser should be protected after 30 days, and that an application to set aside the sale should be brought within 30 days of the sale, even though the judgment-debtor was ignorant of the sale and of the decree-holder's fraud which brought about the sale. The judgment-debtor in such a case ought to be left to

his remedy for damages caused to him by the decree-holder's fraud.

The case where both the decree-holder and the Court-auction-purchaser have been guilty of fraud raises a question of greater difficulty and nicety. Is it reasonable to hold that even in such a case the judgment-debtor should only sue them for damages for the fraud after the expiry of the 30 days and cannot get back his property which had been sold in the Court auction through the fraud of both the decree-holder and the purchaser? After anxious consideration and with great diffidence I am inclined to hold that the judgment-debtor even in such a case cannot apply under O. 21, R. 90, after the expiry of the 30 days for setting aside that sale. As regards the relief for the setting aside of the sale, the procedure pointed out by the Legislature is only by an application under O. 21, R. 90. It may be that other appropriate reliefs, which in justice are due to the judgment-debtor to get rid of the effects of the fraud practised by the Court-auction-purchaser, may be open to him by instituting a suit praying for such other reliefs. I do not wish to hold that the Courts are powerless to imagine, invent, and grant other appropriate reliefs in such cases. It may be that the Court without setting aside the sale can give an injunction to the Court-auction-purchaser to reconvey the property to the judgment-debtor. Such injunction would have an effect similar to the effect of a decree for specific performance of a contract to sell. The hands of Courts of Justice are not tied in these matters simply because, to support the grant of a particular appropriate relief, no exact precedent could be quoted. As regards a suit for such other appropriate reliefs that suit would be governed by Article 95 of the Limitation Act, which gives three years from when the fraud becomes known to the party wronged. In the result I would also dismiss the appeal with costs.

S. N /R. K.

Appeal dismissed.

A. I. R. 1916 Madras 39

WALLIS, C. J. AND SRINIVASA AIYANGAR, J.

T. B. K. Viswanathaswami Naiker—Plaintiff—Appellant.

v.

Kamulu Ammal and others—Defendants—Respondents.

Civil Appeal No. 118 of 1906, decided on 26th October 1915, against the decree of Sub-Judge, Madura (West), dated 14th October 1905, in Original Suit No 31 of 1902.

(a) Practice—Pleadings—In India rules of pleadings cannot and should not be strictly enforced—Custom must be alleged with distinctness and certainty—Issue about custom ought to contain particulars of the custom.

Though, as a general rule, a party who relies upon a custom, must allege it with distinctness and certainty, it is not possible or desirable in India in all cases to pin down the parties to the precise form of their pleadings. [P. 41, C. 1.]

As a matter of scientific pleading, an issue in a case regarding a custom set up therein and the allegations in the plaint on which the issue is based, ought to contain particulars of the custom upon which the plaintiff seeks to rely at the trial. [P. 41, C. 2.]

(b) Evidence Act (1 of 1872), S. 115—Not objecting to a witness deposing about custom not alleged does not estop a party to object a second witness deposing on the same point.

The mere fact that a defendant did not object to witnesses for the plaintiff giving evidence in support of a custom set up in a case, does not estop him from objecting to similar evidence being given by another witness on a subsequent date on the ground that it was "beyond the scope of the case in the face of the wording" of the issue on the point. [P. 41, C. 2.]

(c) Practice—Issues—Ambiguity—Issue ambiguous but in earlier stages understood and acted upon in narrower sense—Parties would not be allowed to contend at late stage that wider interpretation should be followed.

Though in cases where an issue is ambiguous and capable of a wider as well as a narrower interpretation and the parties have, in their conduct of the case in its earlier stages, interpreted it in the narrower sense, they will not afterwards be permitted to contend at the latest stage of the case that the wider interpretation ought to be followed; yet where the contention is raised at an earlier stage, it is desirable to give the parties an opportunity of contesting the case upon the wider interpretation of the issue.

35 Cal. 232 (P. C.) distinguished.

[P. 41, C. 2 & P. 42, C. 1.]

(d) Hindu Law—Joint family—Presumption—Mere separate living or separate enjoyment of property is no evidence of partition.

Separate living of different branches of a joint Hindu family in different houses in the same compound is no evidence of division among

the branches. It does not inevitably follow from separate possession and enjoyment of property that the family is divided, nor does discontinuance of allowances which have been paid to members of his family by a *zemindar* justify that conclusion. [P. 44, C. 2.]

(e) Hindu Law — Succession — Impartible Zemindari with respect to impartible Zemindari step-brother excludes illegitimate son of sudra Zemindar but with respect to separate property he shares equally with widow.

Where the last holder of an impartible *zemindari* belonging to a joint Hindu *Sudra* family died leaving behind him a widow, an illegitimate son and his step-brother :

Held, that so far as the *zemindari* was concerned the illegitimate son was excluded by the widow of the deceased *zemindar* but that as regards the separate property of the *zemindar* not forming part of the *zemindari*, the illegitimate son was entitled to share equally with the widow. 10. Mad. 334, foll. [P. 45, C. 1.]

(f) Hindu Law—Minor—Relinquishment by guardian—Where cannot be effective even as family settlement pointed out.

The mother of a Hindu minor, purporting to act as his guardian, relinquished his claim to a *zemindari* which was of considerable value, on receipt of comparatively insignificant properties. It did not appear that she had obtained any legal advice as to the right of the minor to the *zemindari*. At the time this arrangement was made, there was no active dispute or question raised as to the minor's title to the *zemindari* :

Held, that the release was not binding on the minor as it was beyond the powers of the guardian and that it was not valid even as a family settlement. [P. 46, C. 2.]

(g) Hindu Law—Succession—Illegitimate son —Custom—No custom exists in Kambala caste for exclusion of illegitimate sons.

There is no custom obtaining among the *Kambala* caste excluding an illegitimate son from inheriting property which would devolve upon him under the ordinary law.]P. 54, C. 1.]

(h) Practice - Relief—Claim for exclusive possession—Relief of share can be granted.

A plaintiff suing for exclusive possession of a *zemindari* can be given a decree for the share he may be found entitled to in the separate property of the *zemindar*. [P. 46, C. 2.]

(i) Hindu Law—Marriage - Custom—(Per Miller, J.)—Quære—Whether Gandharva is valid by custom among Kambalas—(Per Abdur Rahim, J.)—Gandharva is valid among Kambalas.

(Per *Miller, J.*,) *Quære.*—Whether the *gandharva* form of marriage is regarded as legal by the custom obtaining among the people belonging to the *Kambala* caste 17 Mad. 422, ref. to. [P. 43, C. 2.]

Per *Abdur Rahim J.*—The *gandharva* form of marriage is not valid amoug the *Ka anla* caste people. [P. 48, C. 2.]

(j) Hindu Law--Meaning of Custom—Court not bound to recognise validity of form of marriage which is irregular and which has been long since abandoned by a particular caste.

Where a certain caste among the Hindus has long given up a particular irregular form of marriage and has been consistently adopting other more regular forms, the Courts are not obliged to recognise the validity of the obsolete form in that caste. [P. 49, C. 1.]

T. Rangachariar, C. S. Govindaraja Mudaliar, C. S. Venkatachariar and *N. R. K. Tata Chariar*—for Appellant.

S. Srinivasa Iyengar, K. V. Krishnaswami Iyer, T. V. Muthukrishna Iyer, P. Tirumalachariar and *R. Padmanabha Chariar*—for Respondents.

Facts.—The suit was for the recovery of possession of the *zemindari* of Bodinayakanur with all its appurtenances, on the ground that the plaintiff, as the son of the late *zemindar* by a woman who was married to him in the *gandharva* form (which form of marriage was customory among the *Kambala* caste to which the *zemindar* belonged), was entitled to succeed thereto in preference to the widow and the step-brother of the deceased. The claim was resisted *inter alia* on the grounds that the plaintiff's mother was not legally married by the late *zemindar* but was only kept as his concubine, that she belonged to quite a different caste, that it was not customary in the caste to marry a woman in the *gandharva* form, that the plaintiff was only an illegitimate son of the late *zemindar* and as such, was not entitled to succeed to the *zemindari* and its appurtenances, that the late *zemindar*, by his last Will and testament, had bequeathed the *zemindari* and his other properties to the 1st defendant, that during the plaintiff's minority, his (the plaintiff's) mother, acting as his guardian and in consideration of certain properties received by her on his behalf had released whatever rights he might have had in the *zemindari* in favour of the widow and that the suit was in consequence not sustainable. The Subordinate Judge of Madura, who tried the case, dismissed the suit. The plaintiff appealed.

(This appeal was first heard by Sir Charles Arnold White, Chief Justice and Ayling, J.).

White, C. J.—We have had some doubt as to what is the proper course for us to adopt in this case. But we have come to the conclusion that it is desirable that we should have before us, in dealing with the appeal, the evidence which the learned Subordinate Judge thought he ought to exclude with reference to the custom which the plaintiff sought to establish at the trial of this suit. Now it may well be, as Mr. Visvanadhier, the learned Subordinate Judge before whom the case came in its earlier stages, observed in his order of the 22nd July 1904, that the custom referred to in paragraph 4 of the plaint, could not be construed as referring to the custom which the Judge describes in the earlier part of his order. If we turn to the plaint, we find certain allegations of fact in paragraph 3, but no allegation as to the legal results that flow from these facts if the facts were established by evidence. We have no reference to the custom in paragraph 3. In paragraph 4, we have a reference to an alleged custom obtaining among the caste and to an alleged custom obtaining in the *zemindari*. And, as I have said, it may very well be that the custom which was present to the mind of the Pleader who drafted this plaint, was a custom as alleged in paragraph 4, and not a custom in connection with the allegations made in paragraph 3.

No doubt, as a general rule, a party who relies upon a custom must allege it with distinctness and certainty. Speaking for myself, however, I do not think it is possible or desirable in all cases in this country to pin the parties down to the precise form of their pleadings. If we were to deal with this question, having regard to the precise form of the pleadings, I feel bound to confess that one would have considerable difficulty in adopting a view different from that taken by Mr. Visvanadhier.

When we turn to the course which events took at the trial, we find that the 18th witness for the plaintiff on the 8th April 1904, gave evidence in support of the custom upon which the plaintiff now relies and no objection was taken to that evidence. On the 14th July, another witness gave evidence in support of the custom and no objection was taken to it. It was not until the 15th July, when the 26th witness for the plaintiff gave evidence that 'a *Kambala* can take as his wife a virgin without marriage rites', that objection was taken on behalf of the 1st defendant to the admissibility of this evidence on the ground that it was "beyond the scope of the case in the face of the wording of the second issue" and that objection was upheld. I do not suggest, of course, that because the defendant did not object to the evidence of the witness given in April, he was estopped from objecting to the evidence to a similar effect given by another witness in July. But it seems to me, in deciding whether in the exercise of the discretion we shall have this further evidence, it is material to observe that some two months before the evidence was given to which the defendant objected, evidence was given in the suit to the same effect without any exception being taken to it on behalf of the defendant. Now the actual form of the second issue as it now stands is :

"Whether the arrangement set up in paragraph 3 of the plaint is true, and whether such an arrangement; in the absence of the factum of marriage, will give the 4th defendant, the status of a wife."

It is common ground that the expression 'factum of marriage' means ceremonies—marriage ceremonies in connection with the alleged marriage. As I observed, I have no doubt as a matter of scientific pleading, this issue and the allegation in the plaint on which the issue is based ought to have contained particulars of the custom upon which the plaintiff sought to rely at the trial. There can, I think, be no question that the words in themselves are wide enough to render evidence of the alleged custom admissible. Mr. Srinivasa Aiyangar, who contended that we ought not to interfere with the order made by the Subordinate Judge, referred us to a recent appeal to the Privy Council from Burma, *Ma Wun Di* v. *Ma Kin* (1), and he called our attention to an observation made by their Lordships on page 242 with reference to a similar question. The observations are in these terms :

"Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case,

(1). (1908) 35 Cal. 232=35 I. A. 41 (P. C.)

have construed it in the narrower sense of assuming the existence of a marriage."

As Mr. Rangachariar pointed out, this case cannot be regarded as on all fours with the case before us, because in the Burma case, it was at the latest stage of the proceedings that the question came before the Privy Council--the question as to whether the parties could treat an issue as having a certain meaning and whether it was capable of that meaning in view of the fact that the issue had been construed in another and narrow sense at the earlier stage of the proceedings. But here the question has arisen at an earlier stage, namely, on appeal before us from the decision of the Subordinate Judge declining to admit certain evidence.

On the whole, we have come to the conclusion that it is desirable that the plaintiff should have an opportunity of adducing the evidence which the learned Subordinate Judge thought he ought to exclude. The case will, therefore, go back to the Subordinate Judge for a finding on the following issue :

"Is there a custom among the *Kambala* caste which would create the relationship of husband and wife without any marriage ceremony by the mere fact of a *Kambala* taking a virgin of another sect into his family as his wife and treating her as his wife, and which would give their offspring the same rights as those of the offspring of a couple who have gone through a marriage ceremony."

The plaintiff will be at liberty to adduce additional evidence and the defendants will also be at liberty to adduce evidence with regard to this issue.

Our order is, of course, without prejudice to the question as to the validity of the custom, if proved. The findings should be returned in six weeks and seven days will be allowed for objections.

Ayling, J.—I agree.

[In compliance with the above order the Subordinate Judge of Madura returned a finding that the custom set up, namely, of a *Kambala* bringing a virgin of another caste and living with her as wife and treating her as his wife, was neither a definite nor an ancient one, was not proved to be regarded as a proper one by the community, and was not plural or uniform and that he was unable to accept the nine instances referred to before. him as sufficient to prove a custom, as instances of such unions having been challenged and recognized were almost wanting].

[The appeal was then heard by Miller and Abdur Rahim, JJ.]

JUDGMENT.

Miller, J.—The appellant is the son of the late *zemindar* of Bodinayakanur who died on the 15th of December 1888. The principal question which we have to decide is whether his mother Karuppayee, the 4th defendant in the suit, was married to the *zemindar* or not. The Subordinate Judge has found that she was not married, and I concur in that conclusion. It is conceded that there were no marriage ceremonies performed ; it is conceded that there are ceremonies ordinarily in use in the *Kumbala* caste to which the *zemindar* belonged. The lady was a lady of a different caste—of the *Marava* caste —the daughter—so far as we know—of an agriculturist who lived in the town of Bodinayakanur. It is conceded that there is a secondary form of marriage which in *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (2), was found to be a legal marriage in this caste in the Saptur *zemindari* ; and it is conceded that that form of marriage was not made use of on the occasion of the union of the *zemindar* and the 4th defendant. What is alleged is that there was a marriage by mutual consent of both parties. The lady said that she would not go and live with the *zemindar*, if he did not make her his wife, and the *zemindar* agreed to take her as a wife. Now it was suggested—and a finding was called for on the point—that by the custom of the caste to which the *zemindar* belonged, such an agreement amounts to a lawful marriage. The Subordinate Judge has found against the existence of the custom, and we are not asked to reverse that finding. So we have it that there is no custom of the caste by which marriage by mutual consent is marriage ; and we are driven to look in the law laid down in *Shastras* for some form of marriage by mutual consent which might be applied to this case. But it is necessary first to find that the agreement alleged by the lady is proved, and I am unable to differ from the Subordinate Judge's finding that that agreement is not proved. Immediately after the

(2) (1894) 17 Mad. 422.

zemindar's death, steps were taken by the Collector of the District, as is usually the case on such occasions, to ascertain facts in relation to succession and so forth, of the *zemindari*. On that occasion, as Exhibit I shows, this lady, the 4th defendant, made no claim of any sort to be the wife of the *zemindar*. The Tahsildar in the Deputy Collector's presence took a statement from her, in which she did not say she was the *zemindar's* wife, and before the Collector, she made no claim of any sort to succession on behalf of her son. Now it seems to me that that could hardly have been her attitude at that time, if, as a matter of fact, some years before she had insisted on being made a wife before she would consent to enter the palace at all. Consequently, it seems to me that Exhibit I and also Exhibit II, in which she did not hesitate to describe herself not as a wife, but as *bhogastri*, are strongly against the alleged agreement. No doubt, it is suggested that the term "*bhogastri*" found in Exhibit II may be used to denote a married woman or wife and that was so in the Saptur *Zemindari* case: *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (2). But here it seems to me that the lady's own evidence shows that she did not regard this word *bhogastri* as meaning a wife. She would resent being called *bhogastri*. It is pretty clear that at the time of *zemindar's* death, she made no claim of any sort to be his wife.

Now as to the evidence in support of the agreement, the agreement is supported by evidence which I cannot regard as of any very great value. The plaintiff's 1st witness who was employed in the *zemindari*; the plaintiff's 2nd witness who is the 4th defendant herself; the plaintiff's 4th witness who is the 4th defendant's cousin; the plaintiff's 5th witness who was a servant of the *zemindar*; the plaintiff's 6th witness who was also a servant of the *zemindar*—those are the persons who allege this agreement between the *zemindar* and the 4th defendant, and none of them, it seems to me, is a person who can be trusted in this matter. The plaintiff's 1st witness might have known the circumstance when he was a store-keeper under the *zemindar*, but he is not a person entitled to special credit, and there is no doubt that there are ways of obtaining evidence, in suits of this kind as in others, which have to be taken into consideration in judging the credibility of witnesses. The 2nd witness is the 4th defendant herself, and I am afraid that her statement on the subject cannot be relied on, having regard to Exhibit I and seeing how deeply interested she is in the result. The 4th witness is her cousin and the 5th witness is a petty servant of the *zemindar* whose evidence cannot be said to be of very great value. The 6th witness is a servant of the *zemindar* of, perhaps, some higher status; but he is also a defaulting tenant of the 1st defendant: and that might have induced him to give evidence for the plaintiff. So that there is no direct evidence of any very great value on this point—none, certainly, sufficient to counteract that afforded by the strong fact that the lady never alleged a marriage at the time at which she might have been expected to do so, when upon it depended the right of her son to succeed as the son of the *zemindar* immediately after his death. So that, I have no hesitation in finding that that agreement is not proved by this evidence. That being so, it is unnecessary to say whether I should have to hold that the *gandharva* marriage by mutual consent, would be a legal marriage between the *zemindar* and the 4th defendant. There was no such marriage. The lady was taken into the palace under circumstances which have not been proved by any direct evidence, unless I accept the defence evidence that she was abducted without the knowledge of her family, but it is unnecessary for me to say anything about that.

The lady not being married, the case of her son, the plaintiff, must be treated upon the footing that he was the illegitimate son of a continuous concubine of the *zemindar*.

Then we come to another question of fact which is to be decided, and that is whether the family of the *zemindar* was divided or not. It is perhaps really not necessary to decide it; because if the family were divided, then it seems to me, on the decision in *Parvathi* v. *Thirumalai* (3), the plaintiff would be excluded by the widow; if the family were not divided, then it seems to me our decision must be that the plaintiff would be excluded by the 5th defendant. However, the Subordinate Judge has gone into the question, and it may be desirable to decide it on the evidence. I am of

(3) (1887) 10 Mad 334.

opinion, that it has been rightly decided by the Subordinate Judge that division is not made out. But before I go on to say anything about this evidence, I ought to refer to some evidence on the question of marriage which I forgot to deal with just now: some circumstantial evidence relied upon by the plaintiff. Once we find that the terms of an agreement are not proved by the direct evidence, and that there is no custom in the caste of marriage by mere consent, then circumstantial evidence cannot go far to prove such a marriage in this case. The evidence is evidence of treatment of the 4th defendant and her son, mostly during the life of the *zemindar*, and might no doubt, standing alone, be used as an indication of a legally valid marriage in due form. But we know that there was no marriage in due form, that is, in any of the customary forms in the caste, and the evidence of treatment could only go to show that the *zemindar* and his people believed that his union with the 4th defendant was a valid marriage. Considered in that light, the evidence of treatment is really of no great value in this case. But I may say generally that I agree in the finding of the Subordinate Judge that it does not show what it is intended to show. The plaintiff could show no more than that he was treated with affection and his mother was treated with affection and consideration by the *zemindar* during his life-time, and there is nothing incompatible in this evidence with the position of the lady as a favoured concubine and the mother of the *zemindar's* only son. Two circumstances to which the Subordinate Judge refers—circumstances which occurred after the death of the *zemindar*, the alleged putting of new clothes upon the 4th defendant immediately after the *zemindar's* death and the throwing of earth upon the grave by the plaintiff—might point to the recognition of the 4th defendant by the family as the widow of the *zemindar*, but upon these points, there is a conflict of evidence, and it is not satisfactorily proved that either of those things was done, and even the circumstantial evidence is not all in the plaintiff's favour. We find that in the *zemindari* accounts, the lady is referred to simply by her name 'Karuppayee' and not with any of the courtesy titles which, the Subordinate Judge points out, are usually accorded in the *zemindari* documents to the wives of the *zemindars*. So all the circumstances are not in her favour; and on the whole, as I have said, I can attach little value to this evidence as evidence of the agreement which forms the only marriage alleged.

Now to return to the question of division, it is not alleged that any partition of the property was made at any particular time. All that was alleged are certain circumstances such as separate residence and separate holding of property by different branches of the family. The branches lived in different houses but in the same compound. That, I think, is not evidence of division. Then it is said that they owned separate properties of the *zemindar*; but all that that means, so far as I understand the evidence, is that some members of the family held, under the Court of Wards or under the *zemindar*, portions of the *pannai* lands, not as having been divided into shares as their own property, but as lessees. That could hardly prove division. There are two judgments in suits to which the 1st defendant was a party and in which she alleged division, and the Judge then held that the *zemindar* was divided from his uncles. It was to the interest of the 1st defendant to allege it then, and I do not think those judgments are of any very great value in this case. On the other hand, there is Exhibit 42 which shows that there was no division at its date, *viz.*, the 1st November 1862. One member of the family, Vadamalai Muthu Naiker, was living separately, and the others were all living together as one family. That was in 1862, and there is no evidence of any partition thereafter. Surely, if there had been a partition among the various branches of the Bodinayakanur *Zemin* family after 1862, there must have been some record of it. Then it is said that allowances which had been given by the *zemindar* to members of the family, were withheld by him in some cases. There is evidence suggesting that the *zemindar* was displeased with his relations, and he might have withheld the allowances on that account, and the fact that they did not go into Court and sue for them, seems hardly to justify the conclusion that there must have been a division long before; though it may be some evidence in favour of it, is not enough to turn the scale in the plaintiff's favour. And, further, supposing that the evidence of separate holding of lands were taken in favour of the plaintiff as showing division of those lands (though I think that is not so here), even then that would not be enough to show that as regards the *zemindari* itself, there was a

division. There is certainly no evidence in this case that there was any division of the *zemindari*—that the *zemindari* was made to form a share of the family property before that time and was allotted to any one branch of the family—or that in any way, there was a separation in regard to the enjoyment of the *zemindari* among the co-parceners. The Subordinate Judge has examined the documentary evidence and he has come to the conclusion that there was no division. His judgment is full on the subject and it is not necessary that I should discuss those documents in detail. Once it is shown—and I think it is shown by Exhibit 42—that there was no division in 1862, it seems to me that much stronger evidence than we have in this case, is wanted to show that a division was made between the co-parceners after that time.

Holding, then, with the Subordinate Judge, that there was no division, it remains to be seen what is the position of the plaintiff as the illegitimate son of the *zemindar* in an undivided family. Now there is a decision in *Parvathi* v. *Thirumalai* (3), which is directly in point. There it was held that in the case of impartible property, the widow excludes the illegitimate son, and where the property is separate property, both the widow and the illegitimate son would be entitled to have a share in such property. Now the contention on behalf of the appellant was that that decision was shaken by the decision of the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*, (4).

In a later case in this Court, no doubt it was said that that decision was somewhat shaken, inasmuch as it expressed some doubt as to the correctness of the decision in *Jogendro Bhuputi* v. *Nittyanund Man Singh* (5), which was upheld by the Privy Council. That it has ever actually been overruled, is certainly not the case, and in this Court in *Karuppa Goundan* v. *Kumaraswami Goundan* (6), it was pointed out that the Privy Council case might properly be confined to its own facts, the case of the succession of an illegitimate son to the share of his legitimate half brother. There was a legitimate son and an illegitimate son of the same father and the Privy Council held that they were co-parceners. But in *Karuppa Goundan* v. *Kumaraswami Goundan* (6), it was pointed out that the decision stopped there and need not be extended so as to involve a co-parcenery in the other collateral relations. Now *Karuppa Goundan* v. *Kumaraswami Goundan* (6) is a case which is binding on us, and, if I may say so, it seems to me, that it is a proper interpretation of the Privy Council's decision, and that their Lordships did not intend to decide anything that was unnecessary for the purpose of deciding the question before them. Then we have some decisions of this Court as regards collaterals, that the illegitimate son is not entitled to succession in competition with them. There is the case to which I have referred and *Gopalasami Chetti* v. *Arunachellam Chetti* (7), which, no doubt, is a case of partible property. But I shall show at once that that can make no difference.

So far as joint family property goes in this Presidency, the decision in the Privy Council case does not prevent us from following the decisions of this Court that an illegitimate son is excluded by his father's co-parceners, Now Mr. Rangachariar contends that we ought not to treat the property as joint property, but that since the decision in *Sartaj Kuari* v. *Deoraj Kuari* (8), an impartible *zemindari* has come to be held to be the separate property of the *zemindar*, and we must so treat it; the *zemindari* in this case descends by lineal primogeniture, and the plaintiff, though illegitimate, is a son; and it is only in the absence of sons that we need look for any other heir; on these grounds, we ought to decide that the son is entitled to succeed to his father in preference to the widow or co-parceners. But the rule, as I understand it, when we have to look for the heir to an impartible *zemindari*, is to see what the law of succession would be if the property were partible, with reference to the nature of the property, as ancestral or separate, and choose the successor accordingly, and if the successors would be the whole joint family, select one of the members by applying the rule of primogeniture, or whatever it be, applicable to the particular case. Now if that is so,—no decision has been cited to us which shows that it is not,—if we are to have regard to the nature of the property and see what would happen in the case of partible property, then there can be no doubt, according to the decisions

(4) (1891) 18 Cal. 151=17 I. A. 128 (P. C).
(5) (1885) 11 C. 702
(6) (1902) 25 Mad. 429.
(7) (1904) 27 M. 32.
(8) (1888) 10 A. 272=15 I. A. 51 (P. C.)

of this Court, that the plaintiff is excluded by his father's co-parceners. All the cases which have been cited to us by Mr. Rangachariar as showing that there is no co-parcenery, properly speaking, in a case where the property is impartible as indicating that we ought to treat this as the separate property of the *zemindar*, do not, in any way, deal with or depart from the rule which is to be adopted in looking for a successor to the *zemindar*. There is, it may be, no real, at any rate, no effective co-parcenary in the case of an impartible estate, no effective interest in any collateral member of the family during the life-time of the *zemindar*. That may be the effect of the cases, but they do not, in any way, interfere with the rule that when you have to look for a successor, you should find a person to succeed who would be one of the co-parceners if the property were partible. Now if this property were partible and the family joint, the 5th defendant would succeed. If it were separate property, the 1st defendant would succeed (*Parvathi* v. *Thirumalai* (3)). Consequently without going into all the cases which were cited, there is really no doubt that the plaintiff must, as the illegitimate son of the *zemindar*, be excluded from succession by the 5th defendant. The suit must fail so far as that goes.

There is another question. There was a question raised, whether the plaintiff is bound by a release executed by his mother (Exhibit II). That is a question raised on behalf of the respondent in bar of the plaintiff's claim. On the finding that his claim to the *zemindari* fails, it is only necessary to discuss the question of release in view of another question, whether he may be entitled to share in certain property which is alleged not to form part of the impartible *zemindari*. The release was made by the plaintiff's mother, the 4th defendant, on his behalf during his minority, and by it, she gave up all claims to anything in the *zemindari* and all the properties forming part thereof. She gave it up on his behalf in consideration of the allotment to him of certain land, a small amount of property compared with the *zemindari*. It is not shown that the lady had any independent advice in the matter. It was suggested that there was one person, the defence witness No. 20, who was her adviser : but he does not say so, and there is no suggestion that she had any other. On the other hand, we have it, the persons who drew up the document, are persons employed by the 1st defendant. So that it seems to me that it is very difficult to agree with the Subordinate Judge that this was a *bona fide* settlement by the family of family disputes or matters about which there were likely to be disputes. I think it will have to be held that the act of the 4th defendant was not binding upon her son and that the release is not a bar to the claim made by him to the *zemindari*.

The remaining question is whether there is any property left by the *zemindar* which is not part of the *zemindari*. If so, it seems to me on the decision of this Court that the plaintiff, the illegitimate son of the *zemindar*, is entitled to share it with the 1st defendant. We should have to find that it is separate property of the *zemindar* and not property of the joint family, and that it was not incorporated in the *zemindari* at the time of *zemindar's* death. Now in the plaint in the suit, the plaintiff did not claim a share ; he claimed the whole and did not add an alternative prayer that if he is not found entitled to succeed to the *zemindari*, he might be given a decree for a share in the property which does not form part of the impartible *zemindari* ; and on this ground the Subordinate Judge has held that he cannot be allowed a share by the decision in this suit. I think that that is not right. There is really no reason why the plaintiff should not be given his share if he is found entitled to it. A more difficult question, to my mind, is, whether he has any title. That was not made an issue until after the close of the evidence and during the argument. But the question was raised before that—at any rate, the question was raised whether there was any property which does not form part of the impartible *zemindari*. On this point, the parties put in statements, but no issue was framed at that time. It is not easy to say definitely that evidence was not let in on this question, or that any evidence which could have been let in, was excluded. But at the same time, inasmuch as there was no issue—before the evidence was closed—I think it difficult—it is unsatisfactory to make an attempt—to decide a question so large as this, upon evidence which it is not clear was all the evidence which would have been led to the issue. Consequently, I think that it will be necessary to admit further evidence upon this question.

A further question arises, whether, if the plaintiff can be given a share, he is not bound to bring in all the property which has

been allotted for him under the release, and of which he is in possession. That question depends somewhat upon evidence as to whether that property was allotted to him by the release or had been given to his mother for him by the *zemindar*, and if the latter, on the circumstances under which it was given. In considering the issues which I propose to send down, the Subordinate Judge can deal with this matter.

Having given the matter the best consideration I can, I think that it is desirable to have the assistance of the Subordinate Judge upon it and he will be requested to record findings upon two issues, namely, (1) whether any of the property in suit, and if so, what property, is the separate property of the *zemindar* and not part of the impartible *zemindari* and if so, (2) to what share (if any) is the plaintiff entitled in it or any part of it.

I think that fresh evidence may be called as to the questions of fact which arise on those two issues. Two months' time will have to be allowed for findings and seven days for objections.

Abdur Rahim, J.—I have arrived at the same conclusion. This suit was instituted by the plaintiff, who is the appellant before us, in the Court of the Subordinate Judge of Madura West to recover the *zemindari* of Bodinayakanur. His claim is that he is the son of the late *zemindar* who died in 1888, and as such entitled to the property.

One of the principal questions that are raised by the appeal, is whether the plaintiff is the son of the *zemindar* as claimed by him. It is alleged that his mother, the 4th defendant in the suit, was married to the late *zemindar* in the *gandharva* form of marriage and it is urged that this form of marriage is valid, according to Hindu Law, in the *Kambala* caste to which the *zemindar* belonged. The Subordinate Judge, in a very full and exhaustive judgment, has found that the plaintiff is, in fact, the son of the late *zemindar*, but he says that he is his illegitimate son as there was no marriage between the 4th defendant and the *zemindar*. There can be no doubt on the facts that the plaintiff's mother was introduced into the palace of the *zemindar* while she was very young and that she lived with him till he died and the plaintiff was born to her. The form of marriage which is alleged to have been gone through according to the plaintiff, was this, both the parties, that is, the *zemindar* and the 4th defendant, who is of the *Maravar* caste and of humble extraction, agreed that they would live as husband and wife, that the latter should be regarded as the legal wife of the *zemindar*, and that she accordingly lived with the *zemindar* in the capacity of a wife. As regards the arrangement under which the 4th defendant came to live with the *zemindar*, I think the judgment of the learned Subordinate Judge is right, that, in fact, there was no agreement on the part of the *zemindar* to accept the 4th defendant as his wife and that she lived with him merely as a concubine. The learned Vakil for the appellant has challenged this conclusion mainly upon certain circumstances which, he says, furnish strong evidence that the 4th defendant must have been living in the palace as a wife and not as the *zemindar's* concubine. All those circumstances are carefully considered by the learned Subordinate Judge and I think that neither any one of them in particular, nor all of them taken together, are such as can be said to be less consistent with the plaintiff's mother consenting to live with the *zemindar* as his concubine rather than as his wife. No doubt, the late *zemindar* treated the 4th defendant, so far as it appears from the evidence, with affection. He apparently took her about to temples and wherever he went on journeys. He gave her accommodation in a part of the palace where his own mother used to live and some other female relations of his, had their quarters. The plaintiff's mother was also allowed a separate cooking establishment and at the plaintiff's birth, certain ceremonies were performed. It also appears that in a certain photograph which was taken of some members of the *zemindar's* family the plaintiff, who at the time was quite a child, was included in the group. On the other hand, there is a very significant circumstance which goes against the case of the plaintiff. The plaintiff's mother is described in the accounts of the *zemindari* merely as "Karuppayee", that is, by her bare name without any such title as is customarily given to ladies of the *zemindar's* family. The plaintiff himself is described merely as '*Thambi.*' The Subordinate Judge, in my opinion, rightly relies on this fact as showing that, although the plaintiff's mother enjoyed the protection and affection of the *zemindar*, she was not regarded by him or

by his officials as his legitimate wife. Also as regards the oral evidence which is adduced in support of the arrangement put forward by the plaintiff, I think the Subordinate Judge has taken the right view. This evidence consists of the testimony of a number of persons who cannot be said to be disinterested and certainly are not people who can be implicitly relied upon to speak the truth. The Subordinate Judge rightly remarks that the fact that the 4th defendant's mother and other female relations of hers did not accompany her to the palace at the time she was first taken there, must be taken as considerably discounting the evidence of the witnesses who were cited to prove the alleged arrangement. On the other hand, there is evidence of certain witnesses for the defendant, including her Pleader, that at or about the time, the 4th defendant was taken to the palace, there was a criminal complaint lodged by certain relations of hers charging the *zemindar* with abduction. The case apparently came to nothing, as the enquiry showed that the 4th defendant went to the palace willingly and there was no abduction. But what is absolutely conclusive against the case of the plaintiff is the conduct of the 4th defendant herself after the *zemindar's* death. There was an inquiry held by the Collector as to who were the heirs of the *zemindar*, and the 4th defendant did not, at the time, put forward any claim on behalf of herself as his married wife, or on behalf of her son as the heir of the *zemindar*. It is inconceivable that if she was conscious that she occupied the status of a legal wife, she would not have asserted that position at once. On the other hand, in the statements that were taken at the time, the 4th defendant is described as "*Bhogastri.*" Admittedly, this description is not ordinarily applied to the wives of *zemindars*. No doubt, Mr. Rangachariar contends that "*Bhogastri*" may simply mean an inferior sort of wife, but the evidence of the 4th defendant herself on the point rather tends to support the case of the defence that "*Bhogastri*" means only a concubine and not a wife. It was really not until the institution of this suit, which, it may be mentioned, is financed by a number of strangers, that a claim was put forward by the 4th defendant that she was married to the late *zemindar* and the plaintiff was his legitimate son. I, therefore, agree with the Subordinate Judge that the arrangement alleged by the plaintiff under which his mother lived in the palace has not been proved.

This is sufficient to conclude the case of the plaintiff so far as the question of legitimacy is concerned. But there is a further question which has been discussed by the Subordinate Judge and which has also been argued before us, namely, that even if the alleged arrangement were proved, it would not, in law, amount to a valid marriage. It is not necessary to discuss this question at any length, but having heard the matter fully discussed at the Bar, I wish to express my clear opinion that the agreement set up by the plaintiff, even if proved, would not amount to a valid marriage in Hindu Law. I do not desire to consider the question whether the *gandharva* form of marriage requires any right or ceremony or not. My opinion is that if this amounts to *gandharva* form of marriage, it has not been shown that such marriages are valid in the caste to which the late *zemindar* belonged. It may be that the ancient Hindu Law text allowed much greater latitude to *Sudras* in the matter of marriage than to the higher castes or rather to the *Brahmins* and that perhaps among the *Kshatriyas*, the *gandharva* form of marriage has, even within recent times, been recognised as prevalent in some parts of India. But if this form of marriage were valid among the *Sudras* or rather in the caste to which the late *zemindar* belonged, I should have expected some evidence to be forthcoming as to its being in vogue among them. Mr. Rangachariar did not refer to any such evidence, and, as a matter of fact, the evidence, so far as it goes, shows that the *gandharva* form of marriage, has long ceased to be practised, if it ever prevailed, in the *Kambala* caste. He admitted that there was a regular form of marriage, or rather two forms of marriage, one of a superior and the other of an inferior character, prevalent in the *Kambala* caste. Supposing, therefore, for argument's sake, that the *gandharva* form of marriage would, according to the ancient texts, be permissible among the *Sudras*, I am of opinion that, so far as this caste is concerned, it must, upon the evidence in the case, be held to be obsolete and no longer recognized as valid. Mr. Rangachariar has strongly contended that if ancient Hindu Law texts sanction this form of marriage, we must hold that it is valid. But I am

not inclined to accept that position. If I find that a certain caste among the Hindus has long given up this form of marriage, and this is shown by their consistently adopting other more regular forms, I do not think that we are still obliged to recognize its validity in that caste.

The position, therefore, is this. The plaintiff is the illegitimate son of the last *zemindar*, and the question remains, whether, as such, he is not entitled to succeed to the *zemindar* in preference to the 1st defendant, the widow of the *zemindar*, or the 5th defendant, his cousin. With reference to this matter, we have to ascertain whether the family of the late *zemindar* was divided or not. Upon this point, the Subordinate Judge has discussed the evidence at great length, and I have no hesitation in saying that his conclusion that the family remained joint, must be adopted. Mr. Rangachariar does not allege that there was any formal division at any particular time, but he only points out certain circumstances from which he asks us to conclude that there must have been a division of the family. The circumstances he relies on, are, mainly, that since about 1884, some members of the *zemindar's* family, the uncles and cousins of the *zemindar*, held separate properties and had separate dealings in respect of those properties and with the exception of one uncle, the others have not been receiving any allowance or maintenance. He also relies upon certain observations in the judgment in a suit between one Kulasekara, an uncle of the *zemindar*, and the present 1st defendant to the effect that the plaintiff therein was divided from the *zemindar*. But none of those circumstances, to my mind, really compel us to come to the conclusion that the family was divided. It is perfectly clear from the documents exhibited in the case that up to at least 1862, all the members of the family lived together, though not in the same building, in the same compound. They received allowances and were treated in every other respect as members of the co-parcenery. Even the Court of Wards, when it had the management of this estate, treated the family as joint, and if there had been a separation after 1884 or 1862, surely there would have been evidence forthcoming as to that. In the absence of that evidence, from the mere fact that some of the members of the family had separate property or cultivated some family lands, it does not follow that there was any alteration in the joint status of the family so far as the *zemindari* is concerned. The discontinuance of allowances to some of the co-parcerners since 1884 was apparently due to the fact that they had quarrelled with the *zemindar*. As regards the observation in the judgment to which I have referred, not much importance can be attached to it as the question of division or non-division was not in issue in that suit. If, therefore, the *zemindar* and his uncles and cousins were members of one joint Hindu family, then, I think, it must be held that the plaintiff has no title to the *zemindari* as against 5th defendant. It is argued on behalf of the appellant that, according to established law, the holder of an impartible *zemindari* has absolute power of disposition over it and, therefore, we must treat the question of succession on the basis of the *zemindari* being the separate property of the *zemindar*. I do not think that that conclusion at all follows. All the decided cases lay down that, for the purpose of finding out the heir to an impartible *zemindari* where the *zemindar* was a member of an undivided family, we have to look to the co-parcenery. That is to say, we have to see who would be entitled to the property if it were the case of an ordinary partible joint family property. It may be that for purposes of enjoyment and disposition by the *zemindar* for the time being, the *zemindari* stands, to a great extent, on the same footing as the private property of the *zemindar*; but with that we have nothing to do. We have before us only the question of succession, and for that purpose we must treat the *zemindari* as ordinary joint family property if the *zemindar* remained undivided from his co-parceners. Then the question arises, can the plaintiff be said to be a co-parcener just as a legitimate son would be and as such entitled to succeed to the *zemindari* which is descendible by the rule of primogeniture? Upon that point, the weight of authority is against the plaintiff, at any rate so far as this Presidency is concerned. The illegitimate son of a *Sudra* is, no doubt, not one of the twelve kinds of sons mentioned in the Mitak-

shara, Chapter I, S. 11. He is not a *sapinda* of his natural father and cannot demand a share in the family property during his father's life-time. In the Mitakshara, Chapter 1, S. 12, his case is treated as a special case, and all that that section lays down is briefly this. The father may, if he chooses, give a share to his illegitimate son; on his death the illegitimate son is entitled to half the share of the legitimate son, he is also entitled to a share along with the daughter's son; and it has been ruled that upon a proper interpretation of the text, the illegitimate son does not exclude the widow or the daughter. I think the text clearly indicates that the illegitimate son is not a member of the co-parcenery to which his putative father belonged. Much reliance is, however, placed upon the ruling of the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh* (4), but all that this decision lays down is that, where a man has left a legitimate son and an illegitimate son, on the death of the legitimate son, the illegitimate son succeeds him by survivorship, because, as I understand the decision, the text of the Mitakshara already alluded to gives him a share along with the legitimate son of his natural father and thus a co-parcenery is thereby created between these two. It has also been decided that if the legitimate son dies leaving a son of his own, that son will take his father's share. But I find no warrant for extending the scope of the Privy Council ruling so as to hold that an illegitimate son is a co-parcener along with his father's uncles and cousins. On the other hand, in a series of cases in this Court it has been held that the text of the Mitakshara relatingto the illegitimate sons of *Sudras* only applies to separate property and not to property belonging to a co-parcenery. [See *Krishnayyan* v. *Muttusami* (9), *Ranoji* v. *Kandoji* (10). *Parvathi* v. *Thirumalai* (3), *Karuppa Goundan* v. *Kumarasami Goundan* (6) and *Gopalasami Chetti* v. *Arunachelam Chetti* (7). Of these cases *Parvathi* v. *Thirumalai* (3), which relates to an impartible estate, is directly in point.]

I am, therefore, of opinion that the plaintiff is not entitled to succeed to the *zemindari* as against the 5th defendant. Nor, in my opinion, can he oust the widow if the *zemindari* were, in fact, the separate property of the *zemindar*. He clearly occupies an inferior status, not only in comparison with the legitimate son, but also the widow, the daughter and the daughter's son, even if it can be said that he is entitled to an equal share with these persons.

On all these points, therefore, the plaintiff's case fails.

I may mention that the Subordinate Judge has also found that the plaintiff is debarred from claiming the *zemindari* by reason of a release executed by his mother, the 4th defendant, by which she relinquished, on behalf of her son and herself, all rights in the *zemindari* in consideration of having received certain properties from the first defendant. But I am unable to agree with the learned Judge on this point. When the 4th defendant purported, on behalf of her minor son, to relinquish his claim to the *zemindari*, which is of considerable value, on receipt of comparatively insignificant properties, it does not appear that she had obtained any legal advice as to the right of the plaintiff to the *zemindari*. There was no active dispute or question raised as to the plaintiff's title to the *zemindari* and, in my opinion, it would be going too far to say that the arrangement can be upheld as a proper family arrangement. I think, a release of this nature is beyond the power of a guardian and cannot be upheld, unless it is proved that it was executed after careful consideration of the minor's claims.

The only other point which we are asked to decide in the appeal is whether the plaintiff is entitled in this suit to obtain his share in the separate properties of the *zemindar*, supposing he left any. The suit as instituted was one for recovery of the *zemindari* and other properties forming part of the *zemindari* and no partition was asked for in the plaint of any properties which might be found to be the private property of the *zemindar*. It, however, appears that, during the progress of the suit, an issue was raised as to what were the private properties of the *zemindar*, though even then the question was not distinctly raised as to the right of the plaintiff to a share in those properties. But, apparently, the question was argued

(9) (1884) 7 Mad. 407.
(10 (1885) 8 Mad. 557.

and the Subordinate Judge refused to go into the matter only because this was a suit in ejectment, and he was of opinion that the plaintiff could not get any relief in respect of the private property of the *zemindar* in this suit. I do not appreciate the difficulty in giving relief to the plaintiff with respect to the separate property of the *zemindar*. It is not shown that all the parties who would be interested in the decision of such a question, are not before the Court. The state of the record, as it stands at present, is not, however, very satisfactory and I agree with my learned brother that we could not arrive at a satisfactory conclusion without having a proper finding of the Subordinate Judge on the point.

For these reasons, I agree in the order proposed.

[The memorandum of objections preferred by the 1st respondent was next argued.]

Miller, J.—We have decided that the plaintiff is excluded from the *zemindari* as the illegitimate son of the *zemindar*, and we have intimated our intention to send down to the lower Court questions for finding whether there is any part of the property left by the late *zemindar* in which the plaintiff is entitled to share. Before asking the Subordinate Judge to find upon these questions, it has become necessary for us to consider certain objections taken on behalf of the 1st defendant, the result of which, if accepted in their entirety, would be to exclude the plaintiff even from the separate property.

The objections are two. The first defendant relied upon a Will, which she alleges, was executed by her late husband the evening before his death, by which she took a life-estate in the whole of the *zemindari* and the separate properties: and there was also alleged during the course of the suit a custom by which in the caste to which the late *zemindar* belonged, illegitimate sons are refused a right to succeed to their father's property. The Subordinate Judge has found both points against the first defendant and the objections relate to them. His decree dismissing the suit, is now sought to be supported on the ground that both those points also ought to have been found against the plaintiff.

I am doubtful whether on a true construction of the Will (Exhibit VI) which is propounded, it could be said that it deals with separate property of the *zemindar* at all. If it does not, of course it is unnecessary for us to consider whether it is genuine or not; but we have heard arguments fully upon the evidence and it may be desirable that we should pronounce our opinion upon the fact.

First then, the first defendant alleges that Exhibit VI is the last Will of her husband. The plaintiff alleges that Exhibit VI is a forgery. The Subordinate Judge has found that Exhibit VI is not proved to be the Will of the late *zemindar*, and he has given in his judgment very full reasons for his finding. He has considered the evidence very minutely and at considerable length; he has dealt with a number of circumstances which have led him to the conclusion that the Will should not be accepted, and I have come to the conclusion that his decision on the point is one with which I ought not to differ. I admit I have come to this conclusion with some hesitation because I have found great difficulty in deciding whether the evidence is sufficient or not to prove the Will; but on the whole, I am satisfied that I ought not to differ from the Subordinate Judge's finding, and I shall shortly state the principal reasons why I have come to that conclusion.

I agree with the Subordinate Judge that on the evidence, the state of the health of the *zemindar* was on the 14th December such that it is difficult to accept the signature in Exhibit VI as the signature which a man in his condition was likely to make, that the *zemindar* was able so late as 5 or 6 in the evening on the 14th December, to make a signature so steady and so strong as that in Exhibit VI—that is a point which we have to bear in mind. Seeing then that the appearance of the Will itself suggests suspicion, we have to look to the circumstances before and after the *zemindar's* death, to see whether it is more likely that he signed it or that he did not. The Subordinate Judge is of opinion that there is clear proof on the evidence that the *zemindar* was contemplating making a will. I am not quite sure that is so. The letter which he received from his legal adviser in Madura, the late Mr. Pole, dated the 9th December, suggests to my mind that until then, at any rate, it was not the

intention of the *zemindar* to make a Will. From the letter, I gather that he sent agents to Madura to see Mr. Pole and consult him whether an adoption could be made. He had been ill for some time, he had been in September to Madura for treatment, he returned in November to Bodinayakanur. Then early in December, he appears to have sent agents to Madura to see Mr. Pole, and Mr. Pole in reply to their representation gives his opinion as to adoption and as to the provision to be made for the illegitimate son, the plaintiff, in the event of adoption being made, but he says nothing about the Will. Exhibit XXVIII to my mind clearly shows that he had not considered that question. There is no doubt Exhibit XXIX, a letter written by Mr. Pole's clerk to the manager of the *zemindari* in which he makes some reference to the Will and to himself as executor, was written about the same time. But it may be that the manager consulted the clerk as to the desirability of the form in which the *zemindar* should make a Will in the event of his making one it may possibly be, the manager recognised that the illness of the *zemindar* was assuming a serious aspect. However that may be, I do not think that Exhibits XXVIII and XXIX suggest that a week before death, the *zemindar* himself had any idea of making a Will. Then there is Exhibit XXXI, letter of the 13th December, which he is said to have sent to the Sub-Registrar of Periyakulam to bring him to Bodinayakanur in order "to register a bond and a Will which I intend doing." We have not the original of Exhibit XXXI. We have only what purports to be an office copy of it written by the *zemindar's* clerk, defence 36th witness, which is suspicious to this extent that it is the last entry in the book that was kept at the time and might have been inserted at any time. The Sub-Registrar's attendance was not procured, the original of the letter which is put in, was not produced and his clerk, the defence 37th witness, says that the original of the letter brought by the *zemindar's* servant on the 14th December never came into his office records at all. So apart from the evidence of the defence 36th witness, we really do not know what was actually sent to the Sub-Registrar, or whether whatever was sent was sent by the authority of the *zemindar* or merely of the first defendant or the manager. *Secondly*, it is difficult to say that this evidence proves, even if we take it that a letter was sent and contained, as Exhibits XXXIV, XXXV and XXXVI would seem to indicate, some reference to the registration of a Will, it is difficult to say that it is proved that the making of the Will was in contemplation of the *zemindar* himself.

That being the state of things as to the *zemindar's* intention to make a Will, it seems to me, there are circumstances which make it improbable that any Will was made. As to what happened on the 14th, we find the accounts (Exhibits WWWW) show certain payments to various persons of sums of money on that day and these persons are no doubt the attestors of the Will. I only allude to this because the Subordinate Judge relies on it, but those payments might have been explained if these witnesses had been asked to explain them, but they have not been so asked, and I, therefore, take it that the accounts ought not to be used as evidence against the Will. But there is no doubt that the conduct of the first defendant on the 15th December, immediately after the *zemindar's* death, does give rise to some suspicion. Before her husband's dead body was removed from the house, she made considerable gifts of land—100 *gulies* each, worth about Rs. 200 a *guli*—to a representative of each branch of her husband's family. That suggests undoubtedly that at that time she had some necessity, some need, of securing that they should not attack whatever she might do, and we find, when the Deputy Collector a few days later suggests to them and asks them questions as to the Will, all of them say they do not know whether there is a Will or not. That again suggests that in spite of the gifts to them, they were not prepared to give up entirely any claim there might arise in their favour by denouncing the genuineness of this Will and—I do not say it is strong evidence, but it does suggest that the facts surrounding the production of this Will, were not altogether satisfactory to the relations of the *zemindar*.

There are only one or two other matters with which I shall have to deal. In Mr. Pole's letter, there is a suggestion for a provision for the plaintiff, the illegitimate son. The Will as propounded makes no

provision for him. I think it is unlikely that unless the *zemindar's* agents had put the matter to Mr. Pole, he would have said anything about any provision for the plaintiff in the letter. So that suggests that the *zemindar* was intending a provision for the plaintiff on the 9th December. The fact that the Will contains no such provision, is commented upon by the Subordinate Judge, and in these circumstances, I think rightly, as pointing against the probability that it was a Will made by the *zemindar* himself. A stronger point perhaps is the fact that of all the nine attestors to the Will, there is not one of whom it can be said, he is a person in a position of such independence that it could be said of him that it is highly improbable he would have been a party to a forgery of the Will. On the 14th December—during part of the day at any rate—there were present two *zemindars* at Bodinayakanur, the *zemindars* of Peraiyur and Gantamanaickanur, and it seems to me extremely difficult to believe that at any time during the day when they had been there, one or the other was not asked to attest it. The Peraiyur *zemindar* was a friend of the late *zemindar*, and yet the evidence on behalf of the first defendant is that while he and Gantamanaickanur *zemindar* were away in the afternoon, the Will was made. If the *zemindar* was so strong as the first defendant would have us believe, there is no reason why he could not have waited till their return; if on the 13th, he contemplated the making of the Will, it is likely that he would ask at least one of these two gentlemen to be an attestor. It is suggested that the *zemindars* would not like to attest for fear of having to come to Court to support the Will; and it is suggested that the *zemindar* would like to keep the contents secret from them. But why he should have done so, it is not at all clear to me, and the fear of having to have to support the Will in a Court, does not seem to be a sufficient reason to deter his friends from attesting his Will.

Then there is another thing against the Will, that is, the form of it. If it was the Will the *zemindar* had contemplated making, if it was, as the first defendant would wish us to believe, copied from the draft of a Pleader of Madura, it is not in a form that one would expect it to be. The Subordinate Judge points out and places a perfectly legitimate reliance on the fact that this Will does not appear to be copy of a draft which would have been made by a gentleman of what I may call literary competence in the Tamil language. It is not likely to be the work of Mr. Seshier; it is more likely to have been drawn up by some of the servants in the palace; and an extraordinary thing about it is that while Seshier was a Pleader on behalf of the first defendant during the trial, and he was actually summoned to appear as witness, yet he was not put into the box to support the case that he drafted the Will. That is a fact which is very much against the case that he drafted the Will, and, therefore, against the case made by the defendant that the *zemindar* had sent agents to Madura to get a draft of a Will. The Subordinate Judge also points out that there were other persons, the Hospital Assistant who attended on the *zemindar*, one of his relations Chockalinga Asari, persons who might have attested the Will but whose attestation does not appear. Those, I think, are the strongest grounds (there are others relied on by the Subordinate Judge) in the case which make it improbable that the *zemindar* did execute the Will. As to the oral evidence, it is mainly the evidence of the attestors and, as I have said, the attestors are not persons on whose word any great reliance can be placed. The oral evidence on both sides is, it seems to me, unworthy of any great credence—on the one hand, there are the attestors and on the other hand, there are witnesses who say that the *zemindar* was in a state of collapse before the afternoon of the 14th, and that does not seem to be true; but the circumstances to which I have alluded and on which the Subordinate Judge relies are sufficient to throw so much doubt on the Will as to justify me in accepting the Subordinate Judge's conclusion that it is not the Will of the *zemindar*.

The other point raises the question of custom—the question whether by the custom of the *Kambala* caste an illegitimate son takes nothing of his father's estate or of the family property. The issue (21st issue) was framed at a late stage of the case after the defence evidence had been recorded: for our purpose, the evidence must be strong enough to show that the plaintiff is excluded by custom, not from the *zemindari* only but also from the partible property which belonged to the *zemindar*. The Subordinate Judge has dealt *seriatim* with all the instances on which reliance was placed to make out this custom. In most of them, he has disbelieved

the evidence ; he has disbelieved the evidence of some persons on the ground that they came to Court without summons, of others, that they are relations of the first defendant or persons favoured by the first defendant, of others, that they are men of straw. It has not been suggested to us that his appreciation of the evidence is not justified ; thus a very large number of the instances to which he refers in paragraph 90 of his judgment, are instances which—though he does not clearly say so in paragraph 91 he holds are not proved, and I think we must agree with him. Then he points out that most of these cases are cases in which the illegitimate sons were provided during the life-time of their father with allotments for themselves : assuming these cases to be true, although it might be that this allotment might not in law prevent them from coming down upon their father's estate for a share after his death, still those are not cases in which the custom is distinctly proved. Because, it may be that the sons were satisfied with what was given them : that does not prove the custom set up. That leaves only a few cases which, as I have said, are for the most part discredited on the ground that the witnesses could not be believed. There is one instance the Subordinate Judge does not seem to disbelieve, that spoken to by the defence 8th witness—he speaks of an illegitimate son not getting any property, but that would be only one instance and would hardly be sufficient to prove a custom. There is another, the 46th witness, an illegitimate son : he says that his father's widow made provision for his maintenance only—but this I find is one of the cases the Subordinate Judge has disbelieved on the ground that the witness attended the Court without summons. There are not, I think, any other cases of which it can be said that they are clearly cases in which illegitimate sons, by reason of a custom, have been excluded from inheritance of property which must have devolved on them under the ordinary law.

This as to the oral evidence. Then there are two judgments against the custom—judgments in which the custom was alleged but held to be not proved ; and there is Exhibit XXIV of 1849 in which a *zemindar* alleged that by the custom of his caste illegitimate sons were not entitled to succeed to a *zemindari*. That is a document which might be valuable, if necessary, to exclude the plaintiff from the *zemindari*, but it is not of any value as we are dealing with the custom in reference to partible property. Considering the Subordinate Judge has disbelieved most of the evidence, he is right in holding that the evidence is not distinct, clear, and sufficient to make out the custom. And as a matter of fact, the custom set up in the written statement was not so general a custom as it was necessary to prove to enable the defendant to exclude the plaintiff from succeeding to the separate property. It is only a custom having reference to the *zemindari*—that was the custom which was set up in the written statement of the 1st defendant : but even that custom was not at first made the subject of a distinct issue. It may be that the 17th issue was intended to include it, as the evidence, the Subordinate Judge has considered was let in by the 1st defendant before the 21st issue was framed, but it is not quite clear to me that the question was properly raised in the suit. Assuming it was, I am prepared to hold that the Subordinate Judge was right in holding the custom was not made out. The effect then of my findings on these two questions raised by the 1st defendant, is that the finding which we agree to call for, will have to be furnished by the Subordinate Judge.

Abdur Rahim, J.—I entirely agree that the memorandum of objections fails on the two points raised by it and I have nothing to add to the judgment which has been delivered.

[The appeal was finally heard after the receipt of the findings by Sir John Wallis, C. J. and Srinivasa Aiyangar, J.]

Judgment.—The *first* question to be decided is whether the plaintiff, as the illegitimate son of his deceased father, is entitled to share equally with his widow, the 1st defendant, or whether he is only entitled to half of her share, *i. e.*, $\frac{1}{3}$rd of the properties. In a series of cases in Madras beginning with *Ranoji* v. *Kandoji* (10), it has been held that an illegitimate son succeeding to his deceased father along with a widow, daughter or daughter's son is entitled to half of the properties and not merely to one-third [*Parvathi* v. *Thirumalai* (3), *Chinnammal* v. *Varadarajulu* (11), *Meenakshi Anni* v. *Appakutti* (12)]. In *Rahi* v. *Govinda* (13), Chief Justice Westropp

(11) (1892) 15 Mad. 307.
(12) (1910) 33 Mad. 226=4 I. C. 299.
(13) (1875-77) 1 Bom 97.

elaborately reviewed all the texts of Hindu Law dealing with the rights of an illegitimate son and came to the conclusion (as we understand the judgment) that the illegitimate son was entitled to a half share of the properties ; and in *Shesgiri* v. *Girewa* (14) Sargent, C. J., who delivered the judgment of the Court, took the same view and understood the decision in *Rahi* v. *Govinda* (13) as laying down the same rule. The learned Vakil for the respondent invited us to construe for ourselves the original text of the Mitakshara, which he says is clearly in his favour. He also cited the commentary of Apararka on the text of Yajnavalkya and the commentary of Medhathithi, the well-known commentator of Manu, on the same text. He further contended that all the text-book writers on Hindu Law who knew Sanskrit have construed the passage of the Mitakshara in the way he construes it. Much may no doubt be said in favour of this construction. But the decisions of this Court are not based merely on the interpretation of the text of the Mitakshara. In *Ranoji* v. *Kandoji* (10), in which the position of an illegitimate son was fully considered, reliance was placed on a passage from the Dattaka Chandrika which states in clear terms that the illegitimate son shares equally with the widow, daughter and daughter's son. It was this very passage of the Dattaka Chandrika which was relied on as authority for not excluding the widow from the succession when there is an illegitimate son, whereas the Mitakshara omits the widow from the category of persons who are not excluded by the illegitimate son. The Dayabhaga, which gives the illegitimate son an equal share with the daughter and daughter's son, was also referred to. In this state of things, we are not prepared to depart from the course of decisions in this Court which hold that the plaintiff is entitled to share equally with the widow.

The *next* question is whether the last *zemindar's* step-brother, Vadamalai, was disqualified by reason of insanity from sharing with his brother their father's separate property. Vadamalai, it should be mentioned, who was older than the *zemindar* but was the son of a junior wife, did not press his claim to succeed to the *zemindari* in preference to his brother, nor did he, after the brother's death, claim the *zemindari* against the widow. As regards the first point the respondents explain that according to the custom of *Kambala zemindars* the son by the senior wife succeeds to the *zemindari*. As regards the separate property left by their father it is urged that there was no need for a partition as Vadamalai lived with his brother, the late *zemindar*, in the palace, and after his death, went on living with his widow, the 1st defendant, whose sister's daughter he had married. These facts, it is suggested, explain his conduct in not having put forward a claim to the *zemindari* after his brother's death, and at the time of the compromise between the widow and the more distant coparceners. The mere fact that Vadamalai did not press his claim to the *zemindari* is not, in our opinion, sufficient proof of insanity. On the other hand, we have the fact that he gave evidence in Court in Original Suit No. 15 of 1891 and though subjected to a lengthy examination gave rational answers, and that he married and had issue. On the whole we think the evidence does not establish that Vadamalai was disqualified from inheriting. It follows, therefore, that the late *zemindar's* share in his father's separate properties on his death passed by survivorship to Vadamalai and that the plaintiff has no claim to them. On this ground his claim to the properties mentioned in Exhibit ZZZZZ also fails.

Item 55 of Schedule A, the next item claimed by the plaintiff, is a bungalow in Madura built by the Court of Wards during the minority of the late *zemindar* at a cost of Rs. 60,000 on a site inherited by the *zemindar* and his brother from their father. The 1st respondent contends that either the bungalow became the joint property of the two brothers as the site was joint property, or that it was built as a town residence for the *zemindar* and was intended to pass with the *zemindari*, and that in either view the plaintiff's claim must fail. We agree with this contention.

The 1st respondent objects to items 61, 65 to 69, 73 to 76, 79 to 113, 116 to 118, 120 to 127, 129 to 138, 149, 151 to 177, 185, 221, 248, 249, 254, 285, 308 to 318, 322, 324, 330 to 345, 348, 350, 352, 354 to 357, 359 to 366, 375 to 379, 63, 64, 371 to 374, 380 to 410, 62, 70 to 72, 77, 78, 139, 140, 146, 323, 326, 328, 358, 367, 217, 218, 228 to 231, 247, 252, 259 to 264, in this

(14) (1890) 14 Bom. 282.

Schedule A, which have been allowed to the plaintiff. They are lands within the ambit of the *zemindari* and the *zemindar* was entitled to the *melvaram* therein. He purchased the *kudivaram* right in items 61 to 410 and succeeded to the *kudivaram* right in the remaining items on the death of his mother. All these lands were cultivated as *pannai* along with the other *pannai* lands of the estate. They are clearly properties intended to be held with the *zemindari*; in fact they are accretions to the *zemindar's* interest in the *zemindari*. Following the decisions of this Court in *Lakshimipathi* v. *Kandasami* (15), *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (2), *The Ramnad* case (16) we disallow the plaintiff's claim to these items.

The plaintiff also claims items 57, 69, 135 and 136 of Schedule C. Item 57 is a jewel usually worn by women. The 1st defendant swears that the jewel was purchased for her. Considering that at that time the 1st defendant was the only lady in the *zemindar's* family who could have worn such a jewel we are inclined to believe her evidence and disallow the plaintiff's claim to this item. The respondent admits that the plaintiff is entitled to item 69. Items 135 and 136 are loose pearls and rubies and the 1st defendant claims them as her *stridhanam*. She did not set up this claim in Exhibit K and there is only her evidence in support of her claim. We are not prepared to act on it. We, therefore, allow the plaintiff's claim to these two items.

The 1st respondent claims the cattle used for cultivating the *pannai* lands, *i. e.*, items 173 to 203 of Schedule C. The appellant admits that if the *pannai* lands are held to be part of the *zemindari* he would not be entitled to a share in them. As we hold that the *pannai* lands are appurtenant to the *zemindari* we disallow the plaintiff's claim to these items. The plaintiff admits that the 1st defendant is solely entitled to item 231 of this Schedule. The plaintiff accepts the valuation given by the 1st respondent for item 229, *viz.*, Rs. 1,300, and will be entitled to his share of this sum and not to Rs. 2,607 as claimed by him. The 1st defendant argues that she ought not to have been made accountable for certain jewels said to have been given by her to her daughter and claims contribution from the partible properties for the expenses connected with her daughter's marriage. This claim was not made in the lower Court and we, therefore, disallow it.

The 1st defendant also contends that the lower Court was wrong in making her liable for items 9, 11, 15 and 17 of Schedule D. Plaintiff's witness No.48, who was the 1st defendant's manager for a considerable time, says that these items were collected by the 1st defendant. She denies this, but does not produce the bonds which should be in her possession. In these circumstances we agree with the lower Court that she is liable to the plaintiff for his share of these items.

The finding of the lower Court will be modified accordingly.

As the release Exhibit II has been set aside, the plaintiff must deliver to the 1st defendant items Nos. 1 to 3 in Schedule I to that deed as they are *pannai* lands and are, therefore, impartible. In the fourth item and the moveables in the same Schedule he is entitled to a half share and he must account to the 1st defendant for the other half.

The plaintiff and the 1st defendant will pay and receive proportionate costs of the appeal.

The memorandum of objections is dismissed with costs; and the Pleader's fee payable will be on Rs. 1,588-15-0 *plus* Rs. 541-1-0.

S. N./R. K.

Decree modified.

(15) (1893) 16 Mad. 54.
(16) (1901) 24 Mad. 613.

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SADASIVA AIYAR AND NAPIER, JJ.

Rama Aiyar—Plaintiff—Appellant.

v.

Vanamamalai Aiyar—Defendant—Respondent.

Second Appeal No. 2057 of 1913, decided on 29th September 1914, against the decree of Sub-Judge, Tinnevelly, in Appeal Suit No. 335 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 55—Vendee not paying full consideration cannot be allowed in equity to recover possession without payment.

In a suit for possession of the property purchased, the vendee who has not paid the full

consideration cannot be allowed in a Court of Equity to recover possession except on the condition of his paying the balance of the purchase-money. [P. 57, C. 1.]

(b) Civil P. C., (5 of 1908), O. 41, R. 33—Second Appellate Court can pass any decree to do justice.

(Under O. 41, R. 33, of the Code of Civil Procedure the High Court is entitled to pass any decree which is in accordance with justice, whatever the decision of the first Court or the lower Appellate Court may have been. [P. 57, C. 2.]

T. Rangachariar for V. *Narasimha Aiyangar*—for Appellant.

M. O. Parthasarthy Aiyangar and *C. V. Ananthakrishna Aiyar*—for Respondent.

Sadasiva Aiyar, J.—This second appeal has arisen out of a suit connected with the suit out of which the Second Appeal No. 694 of 1913, in which judgment was just now pronounced, [*S. Ramasawmy Aiyar* v. *Vanamamalai Aiyar* (1)] arose. The plaintiff in this case is the 1st defendant in the other suit, while the 2nd defendant in this suit is the plaintiff in the other suit. For reasons set out in my judgment in the former suit, I hold that the sale-deed to the plaintiff by the 2nd defendant's father in 1896 cannot be set aside in whole or in part, as that question is *res judicata* by the decision in the former suit of 1906 between the same parties which refused to set aside that said sale-deed of 1896. As, however, it is the vendee (the plaintiff) who has brought the suit for possession and as it was found in the former suit that a part of the purchase money had not been paid by the vendee (plaintiff), he cannot be allowed in a Court of Equity to recover possession of the alienated property till he pays the balance of the purchase money.

In the former suit, it was found that out of the purchase money Rs. 3,000 mentioned as consolidated price for the houses in dispute in this suit and for the lands in dispute in the former suit, Rs. 1,995-8-0 alone had been paid by the vendee and the remaining Rs. 1,004-8-0 had not been paid. This finding is *res judicata* between the parties. The lower Appellate Court's finding in this case that only Rs. 1,000 and odd of Rs. 3,000 was paid and formed part of the antecedent debts, cannot be accepted as the point is, as I said above, *res judicata*. The value of the houses alone was on the date of the sale Rs. 700 according to the findings of the lower Courts. Out of this Rs. 700 the plaintiff must be deemed to have paid Rs. 700 *into* 1995½ *by* Rs. 3,000, that is about Rs. 465. He has not paid the balance of purchase money, Rs. 235. As neither the 2nd defendant nor his father was paid this Rs. 235 and as the father is dead leaving the son as his sole heir and survivor, the 2nd defendant is entitled to obtain the whole of this Rs. 235 in equity before he could be called upon to give up possession of the houses in dispute to the plaintiff. In the result, and as under O. 41, R. 33, of the Civil Procedure Code, this Court is entitled to pass the decree which is in accordance with justice, whatever the decision of the 1st Court or the lower Appellate Court in the suit has been, I would award to the plaintiff (in supersession of the decrees of the lower Courts) possession of the properties sued for, on condition that the plaintiff deposits into Court for payment over to the 2nd defendant Rs. 235 within three months of this date. The parties will bear their respective costs throughout.

Napier, J.—I concur.

S. N./R. K.

Appeal allowed in part.

(1) (1915) 26 I. C. 873.

A. I. R. 1916 Madras 57

MILLER AND SADASIVA AIYAR, JJ.

Kaliba Mavulvija Muhammad Usain Kadir Abttan Sahib and *another*—Plaintiffs—Appellants.

v.

Saran Bivi Saila Ammal and *others*—Defendants—Respondents.

Appeal No. 148 of 1910, decided on 2nd April 1913, from the decree of Sub-Judge, Tinnevelly, in Original Suit No. 8 of 1908.

(a and b) Limitation Act (9 of 1908), Arts. 120 and 132—Arts. 120 and not 132 applies to suit by trustee for recovery of sums advanced to trust—Limitation begins from date of dispossession as trustee.

The plaintiff was appointed by the District Judge as trustee of a mosque during the minority of the defendants. The first defendant on attaining majority on 27th February 1900 sued to recover possession and obtained a decree on 26th April 1902, but the plaintiff did not surrender possession till February 1905. The plaintiff sued for recovery of the sums advanced by him to the trust and not recovered before he gave up possession :

Held, (1) that the suit was governed by Article 120 and not by Article 132 of the Limitation Act; [P. 59, C. 1.]

(2) that limitation began to run from the date of the dispossession, as till then no right accrued to the trustee to bring a suit to enforce his claim against the trust properties. [P. 64, C. 1 & 2.]

(c) Trusts—Reimbursement—Trustee is entitled to out of pocket expenses only till date of order of removal.

The plaintiff was appointed by the District Judge as trustee of a mosque during the minority of the defendants. The first defendant on attaining majority on 27th February 1900 sued to recover possession and obtained a decree on 26th April 1902, but the plaintiff did not surrender possession till February 1905. The plaintiff sued for recovery of the sums advanced by him to the trust and not recovered before he gave up possession :

Held, that the plaintiff was entitled to his out of pocket expenses for the purposes of the trust till 20th April 1902 when his right to continue in possession was negatived by a Court of law. [P. 62, C. 2 & P. 64, C. 1.]

(d) Limitation Act (9 of 1908), S. 14—For exemption cause of action must be same.

The plaintiff was appointed by the District Judge as trustee during the minority of the defendants. The first defendant on attaining majority on 27th February, 1900 sued to recover possession and obtained a decree on 26th April 1902, but the plaintiff did not surrender possession till February 1905. The plaintiff sued for recovery of the sums advanced by him to the trust and not recovered before he gave up possession.

Held, that the time spent by the plaintiff in defending the previous suit could not be deducted under S. 14 of the Limitation Act as his claim was not founded upon the same cause of action [P. 59, C. 2.]

(e) Hindu Law - Religious endowment—Trustee—Trustee can only reimburse himself from rents and profits and not corpus of trust.

The plaintiff was appointed by the District Judge as trustee of a mosque during the minority of the defendants. The first defendant on attaining majority on the 27th February, 1900 sued to recover possession and obtained a decree on 26th April 1902 but the plaintiff did not surrender possession till February 1905. The plaintiff sued for recovery of the sums advanced by him to the trust and not recovered before he gave up possession :

Per *Sadasiva Aiyar, J.*—The charge created in favour of a trustee of a religious or charitable trust enables him to take the sums he has expended on behalf of the trust only from the rents and profits of the trust estate (except in very exceptional cases) and cannot entitle him to put an end to the trust itself by bringing the *corpus* of the religious or charitable trust properties to sale. [P. 62, C. 1.]

K. Srinivasa Aiyangar for *L. A. Govindaraghava Aiyar*—for Appellants.

T. V. Seshagiri Aiyar—for Respondents.

Miller, J.—The question we have to decide is one of limitation and it is not quite simple. The 1st appellant was in 1893 appointed by the District Judge as trustee or manager of an endowed mosque during the minority of the defendants, an expression which has been in a former suit held to imply the termination of his trusteeship on the date on which the eldest of the defendants attained the age of majority. That date was the 27th February 1900. The 1st defendant thereafter sued to recover possession from the appellant and obtained a decree on the 26th of April 1902, and it is conceded that, though the appellant did not actually surrender possession before 1905, we may take the date of the decree as the latest date on which he can be held to have had a right to retain possession.

The appellant's contention is that he has a period of limitation of 12 years under Article 132, or at the least a period of six years under Article 120 of the first Schedule of the Limitation Act, within which to bring his suit for the recovery of sums advanced by him to the trust of which he was trustee and not recovered by him before he lost possession. The merits of his claim have not so far been investigated and we may assume, without deciding, that some of the advances were made before February 1900, and that among those advances were sums which the trustee might properly recover from the trust property. Advances made after February 1900 may possibly also be recoverable, if made for proper purposes, and I do not wish to decide more than that the expenses of the suit of 1901, in which the plaintiff unsuccessfully resisted the 1st defendant's claim to be trustee, cannot be allowed as a proper charge on the trust property.

For the respondents the contention before us is that Article 120 is the appropriate Article as held by the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1), a similar case, and the starting point is the 27th February 1900, the date on which the minority of the 1st defendant terminated and with it the trusteeship of the 1st appellant. The Subordinate Judge has suggested the application of other articles not now relied on by either side and has held that, if Article 120 be applicable, the conten-

(1) (1910) 37 Cal. 229=37 I. A. 27=5 I. C. 404 (P. C.)

tion now advanced on behalf of the respondents must prevail.

I may here observe that the appellants do not now rely on the acknowledgment, Exhibit F, nor on the agreement, Exhibit G. Exhibit F, it is conceded, did not bind all the defendants, and, as the 4th defendant was a minor at the date of the trial and the agreement, Exhibit G, was not sanctioned by the Court, it was open to the parties to resile from it.

The only question, therefore, is the question of limitation. The Trusts Act does not apply to the case, but the Privy Council have held in the case of the public trust that the trustee has a first charge on the property for the purpose of reimbursing himself for advances properly made. It is argued, therefore, that a suit to enforce payment of the money charged would be governed by Article 132, and taking the date of the advance as the date on which the money is due, the charge could be enforced in the present case in respect of all proper advances made within 12 years of the 24th January 1908.

But the difficulty in applying Article 132 in this way is that there would be no one to be sued when the money became due. There is no beneficiary who could be sued by the trustee in possession, and the trustee could not sue himself. "Due" must, therefore, mean payable by some one else to the trustee, if Article 132 is to be applied, and limitation would start from the time when the trustee ceased to be able to pay himself. But this interpretation of "due" is open to the objection that the money advanced is recoverable by the trustee as soon as he can get it, and he cannot, properly speaking, recover it before it is "due."

I doubt, therefore, whether Article 132 can properly be applied to a case where a man lends money out of his own pocket to himself as trustee of a religious institution on the security of the trust property, and I think it safer to follow their Lordships of the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1) and to hold that the appropriate article is Article 120.

Applying that article we have to determine the date on which the right to sue accrued. Was it the 27th February 1900 when the 1st defendant attained majority, or was it at the earliest the 26th April 1902 when the Court, refusing to accede to the 1st plaintiff's contentions (as defendant in that suit) that he was entitled to be trustee until the youngest child of the founder ceased to be a minor and that in any event he was entitled to remain in possession till he was paid, decreed the 1st defendant's claim (as plaintiff in that suit) to eject him at once.

Before discussing this question, I may deal with a contention that in any event the time occupied by the 1st plaintiff in defending his suit of 1901 must be excluded under S. 14 of the Limitation Act. I do not think that section is applicable here. The 1st plaintiff as defendant in that suit claimed a right to remain in possession till he was reimbursed; he did not ask for a decree against the then plaintiffs for the money alleged to be due to him. That seems clear from the abstract of the defence set out in Exhibit 1 (the judgment). That being so, his present claim is not founded upon the same cause of action; had he then claimed a decree against the plaintiffs for the money by way of counter-claim, there might be something in the contention, as he might, it is possible, have been held to be prosecuting the claim which he is now prosecuting [vide *Maharajah Jugutendur Bunwaree* v. *Din Dyal Chatterjee* (2),] but his defence in the suit of 1901 cannot be treated as a counter-suit when all he wanted was the dismissal of the plaintiff's suit in ejection as premature.

Moreover the Court did not dismiss his claim for want of jurisdiction to entertain it: it decided that it was unfounded, holding that he had no right to remain in possession till paid; and it told him that a suit for the money might be successful as a suit for a general account of management. The claim made was a claim to remain in possession and that rightly or wrongly was disallowed as a matter of law, and not for want of jurisdiction to entertain it or other like cause.

The answer to the question raised on Article 120 is made to depend, as the case was argued, on the further question whether an ex-trustee remaining in possession can sue his successor in respect of advances made to the trust. There is no beneficiary whom he could sue in the case, and unless he can sue his successor,

(2) (1864) 1. W.R. 310.

there can be no right of suit, and, therefore, limitation cannot start running.

The only suit which appears possible is a suit for a declaration that the property is charged with the amount of the expenses, and the cause of action for such a suit might arise, it is suggested, on the date when the trustee's possession is threatened, in this case, not later than some date in 1901, when the Suit No. 22 of 1901 was instituted by the 1st defendant.

But such a suit would appear to be incompetent so long as the trustee was in a position to collect the rents and pay himself without a suit and without obstruction or threatened obstruction. His possession was in jeopardy in the suit, but his right to a charge on the property for expenses properly incurred was not denied and there was no threat to prevent him from collecting the rents and appropriating them so long as he remained in possession. When turned out he would have a cause of action for expenses then unpaid, but not so far as I can see, before that.

The mere fact that there was in existence a person interested to deny his title to remain trustee would not give him a right to sue for a declaration : that person was not interested to deny his right to re pay himself his proper expenses out of the property so long as he was in possession of it, and apparently did not deny that right but claimed that some unauthorised collection had been made and, I suppose, appropriated by the trustee, though that does not appear in the abstract of the plaint given in Exhibit I.

Consequently, I think, though not without hesitation, that right to sue did not accrue to the plaintiff before the 26th of April 1902, (it may well be that it did not accrue till 1905), and the suit is not barred and must be remanded for disposal. Costs will abide the event.

Sadasiva Aiyar, J.—The plaintiffs are the appellants. The 1st plaintiff was the *de jure* and *de facto* trustee of the plaint mosque from April 1893 to the end of February 1900, a period of six years and ten months. The 2nd plaintiff is the 1st plaintiff's agent. Then the 1st defendant attained majority and became *de jure* trustee, but the 1st plaintiff continued to be *de facto* trustee, refusing to give up possession of the trust properties to the 1st defendant under a claim that, till the 1st defendant's two sisters and one brother also attained majority, the 1st plaintiff was entitled to continue as trustee. The defendants had to bring Original Suit No. 22 of 1901 to eject the 1st plaintiff. That suit was decreed in the original Court in the end of April 1902. The 1st plaintiff still refused to deliver up possession to the defendants, but in execution of the final decree on appeal in that suit, the defendants got possession in February 1905. The plaintiffs have brought this suit for recovery of Rs. 8,000 out of the Rs. 10,000 and odd alleged to have been spent by them till February 1905 for the benefit of the trust. The period covered may be divided thus :—

(*a*) Between April 1893 and February 1900, when the 1st plaintiff ceased to be lawful trustee, (*b*) between February 1901 and April 1902 when the 1st plaintiff was declared by a Court of Justice not to be entitled to remain as trustee any longer, and (*c*) between April 1902 and February 1905, when the 1st plaintiff was ejected from possession of the trust properties. The plaintiffs claim recovery of the amount of Rs. 8,000, costs and interest, "out of the income of the said mosque on the liability of the property of the said mosque and out of the income of the said property." The suit was brought in January 1908, more than 14 years after the 1st plaintiff became trustee, and more than seven years after the 1st plaintiff ceased to be lawful trustee, but within six years of the 1st plaintiff having been declared by a Court of Law to have ceased to be trustee (April 1902) and within three years of his dispossession by the defendants of the trust properties (February 1905).

The learned Subordinate Judge who tried this suit in the original Court dismissed it as barred by limitation. He considered that Article 61, Article 85 or Article 120 of the Limitation Act would apply and that applying any of these articles, the suit was barred. I might state at once that Article 85 has no application, as there have been "no mutual, open and current accounts" and "no reciprocal demands" between the plaintiffs and the trust. If Article 61 applies, the period of limitation is only three years from the time when the 1st plaintiff spent moneys on behalf of the trust. If so, the plaintiffs' claim is barred except in respect of moneys within three years before

suit, that is, between the 24th January 1905 and 9th February 1905, and we might take it that this is a negligible sum, even if it is not zero. On this question of the applicability of Article 61 also, I might at once state that if this suit was an ordinary suit to obtain a single decree for money, it would be no doubt barred by Article 61, but the prayer of the plaint is for the recovery of the plaint amount "out of the income of the (plaint) mosque on the liability of the property of the said mosque and out of the income of the said property." To such a suit, Article 61 cannot apply. If Article 120 had to be applied, the lower Court thought that the starting point for computing the period of limitation could not be later than February 1900 when the 1st plaintiff's right as trustee came to an end, and, as the suit was brought in 1908, the suit was, on that view also, barred.

The plaintiffs' contentions are :—

(*a*) that Article 132 of the Limitation Act providing for a period of 12 years applies to this case, as the plaintiffs claim a charge on the trust properties ;

(*b*) that the 1st plaintiff is entitled to such a charge, because he spent moneys as a trustee who, according to law, can claim such a charge ;

(*c*) that even if he was not a trustee *de jure* for a portion of the period during which he spent the moneys, as a *de facto* trustee he was entitled to a charge on the trust properties just as if he was a *de jure* trustee ;

(*d*) that the 1st plaintiff did not know that he was not entitled to be trustee till the 21st November 1904, when the High Court finally decided against him, and hence he was entitled to a charge for what he spent till that date ;

(*e*) that he was at least entitled to a charge for what he spent till the 26th April 1902, when the original Court which decided Original Suit No. 22 of 1901 pronounced its decision, because, till that date at least, he *bona fide* believed that he was trustee ;

(*f*) that at the lowest, he was entitled to a charge for what he spent before the 27th February 1900, when the first defendant attained majority ;

(*g*) that even if Article 120 of the Limitation Act applied, limitation should be calculated from February 1905, when the 1st plaintiff lost possession, as the 1st plaintiff could not be expected to sue himself while he was in possession of the trust properties ;

(*h*) that limitation could not, in any event, be calculated from before 26th April 1902, when Original Suit No. 22 of 1901 was decided ;

(*i*) that the acknowledgment (Exhibit F) by the 2nd defendant in 1907 of the plaintiff's right to reimbursement saves limitation ;

(*j*) that the *razinamah* entered into by the defendants during the course of the litigation entitled the plaintiffs to a decree for Rs. 8,000 and the lower Court should not have gone into the question of limitation at all ;

(*k*) that the time spent in defending the Suit No. 22 of 1901 and in the conduct of the appeal in that case, should be deducted in plaintiffs' favour under S. 14 of the Limitation Act.

The answers of the respondents to these contentions are :—(*a*-1) Article 132 does not apply to a trustee claiming a charge on properties belonging to a charitable or religious trust. The charge of a trustee is not like an ordinary charge which entitled a man to bring the charged property unconditionally to sale. It is a charge which enables him to take the amount he has spent for the trust out of the rents and profits of the trust property or through raising moneys by the creation of a similar charge to his own.

Article 120 alone applies to a trustee's suit against the *cestui que trust* to enforce such charge [See *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1).]

The 1st plaintiff's claim for what he spent for the trust before the 24th January 1902 is barred.

(*b*-1) The 1st plaintiff could not be held to have spent moneys as trustee, except before the 27th February 1900, and could not claim even this limited charge as trustee for what he spent afterwards.

(*b* 2) He did not spend for the trust the amounts he alleges to have spent before that date.

(*c*-1) A *de facto* trustee is not entitled to claim a charge like a *de jure* trustee and hence Article 61 alone applied.

(*d*-1) and (e-1) The 1st plaintiff knew on the 27th February 1908 that he was not

entitled to be trustee any longer and had no *bona fides* thereafter.

(*g*-1) The possession of the 1st plaintiff had nothing to do with the starting point of limitation.

(*g*-2) Wrongful possession by the 1st plaintiff after the 27th February 1900 could not postpone the starting point of limitation for the 1st plaintiff's suit against the trust to enforce his charge, as plaintiff could have sued the trust represented by its *de jure* trustees to enforce the charge.

(*h*) Even if the 1st plaintiff *bona fide* believed till April 1902 that he could not sue the trust as he himself was the *de jure* trustee and could not, therefore, sue the trust so represented by himself, his said belief could not prevent limitation from commencing to act, no provision being made in the Limitation Act for postponing the commencement of a limitation period, because the 1st plaintiff was labouring under a *bona fide* mistake and believed that he had no right to bring a suit till he lost possession or till a Court of Justice declared that he had no legal status as trustee.

(*i*) The acknowledgment by the 2nd defendant in 1907 could not bind the other defendants or the trust.

(*j*) The *razinamah* (Exhibit G) was not sanctioned by the Court and is useless, as one of the defendants is still a minor.

(*k*) That the time spent in the 1st plaintiff's conduct of the defence in Original Suit No. 22 of 1901 cannot be deducted in the plaintiffs' favour.

That the charge created in favour of a trustee of a religious or charitable trust enables him to take the sums he has expended on behalf of the trust only from the rents and profits of the trust estate (except in very exceptional cases) and cannot entitle him to put an end to the trust itself by bringing the *corpus* of the religious or charitable trust properties to sale has been decided both in England and India. In *Prosunno Kumari Debya* v. *Golab Chand Baboo* (3), their Lordships of the Privy Council say "it is to be observed that execution of the judgments sought to be set aside" (passed in favour of a creditor who had lent moneys to a temple trustee for carrying on the *pooja*, etc., in a temple) "is decreed, *and in their Lordships' view rightly, only against the rents and profits of the* debuttur *lands.*" That a trustee has a lien and a charge upon not only the rents and profits of the trust property, but also upon the *corpus* is clear law (See Lewin on Trusts, Chapter 25, S. 2, paragraph 12). S. 25 of the Trusts Act (which Act, though it does not relate to religious or charitable trusts according to S. 1, contains several provisions which lay down principles applicable to all trusts) says that besides the right of reimbursement out of trust property, the charge which a trustee has upon the trust property for out of pocket expenses "shall be enforced *only* by prohibiting any disposition of the trust property without previous payment of such expenses and interest." This indicates that such a trustee has got only two rights:—

(*a*) to reimburse, to pay or discharge himself in respect of such out of pocket expenses out of the income and profits of the trust property (such right being an unconditional paramount right) and

(*b*) to a charge on the trust property including its *corpus*, a charge which can be enforced only by prohibiting any disposition of the trust property without previous payment of such expenses.

Article 132 of the Limitation Act was evidently not intended to cover such a qualified charge and, in any case, I think we are bound by the decision of the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1) and to hold that Article 120 alone applies to the enforcement of such a charge—I have nothing to add to the reasons given by my learned brother for holding that Exhibits F and G cannot avail the plaintiffs and that the sums spent in defending Suit No. 22 of 1901 and in conducting the appeals from the decision in that suit could not be decreed in plaintiffs' favour. This disposes of the appellants' contentions (*a*), (*i*), (*j*) and (*k*) above.

That the 1st appellant as trustee had a charge for what he spent before the 27th February 1900 and could have recovered that money was not denied (I am just now leaving the question of limitation on one side). Whether he could recover what he spent out of his pocket between the 27th February 1900 and April 1902 (when the plaintiff's right to trusteeship was negatived by the decision of the Court of Law) and whether he could recover what he similarly spent, between April 1902 and February 1905 when he was dispossessed, are questions on which, I must confess, I have felt grave doubts. Was he (the 1st plaintiff) merely and

(3) (1875) 2 I. A. 145.

purely trustee *de son tort* during those periods? Even if he was so, is he still entitled to claim out of pocket expenses during the period when he was such trustee? I find that the expression "express trustees" is held to include even trustees *de son tort* who profess (without title) to hold certain properties as trustees, that trustees *de son tort* might even become constructive trustees if they renew leases in their own names (See Lewin on Trusts, Chapter X) and that a trustee *de son tort* cannot plead limitation against the *cestui que trust* as S. 10 of the Limitation Act, providing that "a person in whom property has become vested in trust for a specific purpose" cannot plead limitation in a suit by the *cestui que trust*, is applicable to trustees *de son tort* also (See Mitra on Limitation, page 771). I think that if a trustee *de son tort* is subject to all the liabilities of an express trustee, he should also be given, in some cases and subject to certain conditions, some of the rights of a lawful trustee to reimburse himself or to recover properly incurred out of pocket expenses. Of course, the accounts of such a trustee *de son tort* may be liable to be subjected to a more severe scrutiny than those of a lawful trustee, but, on principle, I think that what a trustee, of whatever kind, has really spent for the necessities of the trust should be reimbursed to him, if his claim to the office of the trustee was not dishonestly made or if he did not wrongfully continue in possession. I do not say that all trustees *de son tort* are entitled to reimbursement of out of pocket expenses incurred on behalf of the trust. If a man violently and dishonestly takes possession of trust properties under a false claim to be trustee, he cannot be allowed to claim out of pocket expenses. If a man, after being told by a Court of Law that he ought to give up possession to the legal trustee, would not give possession, and then chooses to spend further moneys out of his own pocket taking the chances of obtaining a decision in appeal in his favour, he must also be held to take the risk of losing the subsequent out of pocket expenses. As my learned brother has remarked in his judgment, what the 1st plaintiff spent in Original Suit No. 22 of 1901 and the appeals therefrom to establish his own alleged title (found to be non-existent by the Courts) cannot be treated as moneys spent for the trust and could not be recovered, unless the Court had allowed his costs also to come out of the trust estate. A person who acts *bona fide* as trustee or remains in possession after he had ceased to be trustee by virtue of his lien on the trust properties to recover out of pocket expenses incurred while he was trustee, must however, (it seems to me), be allowed to claim recovery of such expenses incurred during the period when he was legal trustee, and also when he *bona fide* believed himself to be trustee, or when he *bona fide* believed that he had a right to remain in possession of the office till he was so reimbursed. The questions (*a*) whether the 1st plaintiff *bona fide* believed himself to be trustee between February 1900 and April 1902, (*b*) whether moneys were due to him from the trust in February 1900 and the 1st plaintiff believed that he was entitled to continue to hold the office till the amount was reimbursed to him, either or both of these questions might have to be decided by the lower Court for coming to a conclusion on the point whether the 1st plaintiff is entitled to out of pocket expenses (if any) between these dates. After 1902, the 1st plaintiff cannot claim out of pocket expenses, as he must be held to have taken the risk himself and as such expenses were incurred in assertion of his own false title, which he could not have *bona fide* believed in after that date, as his claim to remain in possession after that date was disallowed by the Court. If he afterwards spent money for necessary purposes less than the income got, he must, of course, account for the surplus, but if he spent more, it was at his own risk. He should, however, (I think) be given credit for necessary expenses incurred by him as *de facto* trustee up to the limit of the income derived and should not be debited with the whole income received without being given any credit at all for even necessary expenses incurred.

In the present case, the 1st plaintiff's right to reimbursement of out of pocket expenses before February 1900 is unquestionable (subject, of course, to the question of limitation). The question of the 1st plaintiff's *bona fide* belief as to his legal position after February 1900 till April 1902, when the Court decided against his right, may be relevant in deciding whether the plaintiffs are entitled to claim out of pocket expenses incurred between those dates. That question will, however, not arise if the trust was indebted to the plaintiffs in February 1900, when the 1st plaintiff's title as trustee ceased and if that debt had not been discharged out of the rents and profits before February 1905. The plaintiffs

would have (or at least, could *bona fide* claim) a right to remain in possession till the money was paid up and so long as they remained in possession, they should maintain the trust as *de facto* trustees lawfully in possession of the trust properties. As however, in April 1902 a Court of Law decided against the 1st plaintiff's right to remain in possession, the plaintiffs could not (it seems to me) claim out of pocket expenses incurred after April 1902.

The last question remaining for disposal, the question involved in contentions (*g*) and (*h*) of the appellants, is also one of great difficulty. I was, at first, inclined to hold that the right to sue for the relief of declaring and enforcing a trustee's charge accrued at once on each occasion when he spent moneys out of his own pocket and that after six years from the date of each such accrual, the right to sue for such money became barred. In *Kandasami Pillai* v. *Avayambal* (4), it was held by Benson and Krishnaswami Iyer, JJ., that an agent who had got a right of retainer and a right of lien (Ss. 217 and 222 of Contract Act) has only three years from each of the dates of his spending moneys for his principal for recovery of that money and that the commencement of the running of limitation is not postponed to the termination of the agency. It might fairly be argued, by analogy of reasoning, that the trustee's right also to recover from the trust accured at once on his incurring each out of pocket expense. But I find in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1) that their Lordships of the Privy Council held that the executors of the deceased trustee, Bijoy, were entitled to a period of six years *from the date of his death*, when he, of course, ceased to be a trustee, (and not from the respective dates of his incurring expenses on behalf of the trust) within which to bring their suit for reimbursement out of the trust property. And the reasons given by my learned brother in the judgment just now pronounced by him (and which I had the advantage of perusing before writing this judgment) have led me to the same conclusion as is expressed in his judgment, namely, that till the trustee lost possession of the trust properties, no right to bring a suit to enforce his claim against the trust properties accrued to the trustee. As I said above, this also seems to have been the view of their Lordships of the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1), though their Lordships do not set out the reasons which led them to the conclusion that the date of the death of the former trustee, Bijoy, was the date of the commencement of the cause of action in that case. There is no doubt this difference between the facts of this case and those in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1), namely, that the trustee whose representatives were the plaintiffs in that case was a lawful trustee till his death, whereas the trustee suing in this case ceased to be a lawful trustee in 1900 and was directed in 1902 by a Court of Justice to give up possession of the trust property. But I think that this difference could not affect the principle that, till possession of the trust property out of which the plaintiff could reimburse himself is lost, the peculiar suit to enforce a trustee's peculiar charge could not be brought against the trust. An agent has only the rights of retainer and lien, whereas a trustee has also a distinct charge even after he loses possession of the trust properties; an agent has only three years to sue, whereas a trustee has six years to enforce his charge; an agent can at any time sue his principal, whereas a religious or charitable trustee or one who claims to be such trustee cannot as plaintiff sue the trust as defendant, himself representing the defendant trust, and these distinctions probably prevent the analogy of the case of *Kandasami Pillai* v. *Avayambal* (4) being applied as regards the commencement of the period of the limitation. I would, therefore, hold that the plaintiffs' cause of action arose only in February 1905.

In the result, I concur in the order of reversal and remand made by my learned brother.

S. N./R. K.

Appeal accepted : Case remanded.

(4) (1910) 34 Mad. 167 = 7 P.C. 399.

A. I. R. 1916 Madras 65

TYABJI AND PHILLIPS, JJ.

Inuganti Kasturamma — Defendant — Appellant.

v.

Chelikani Venkatasurayya Garu —Plaintiff —Respondent.

Second Appeal No. 1587 of 1913, decided on 20th August 1915, against the decree of Tempy., Sub-Judge, Rajahmundry, in Appeal Suit No. 129 of 1912.

(a) Contract Act (9 of 1872), Ss. 2 (d), 37 and 40—Promisee doing something at request of promisor—Subsequent agreement will not be contract—What is contract explained—Where it can be enforced stated—What are conditions of valid contract pointed out.

The mere fact that at the desire of the promisor the promisee has already done something prior to any agreement is not sufficient to make any subsequent agreement a contract, nor will such agreement amount to a contract if it was no more than a promise to make a gift at the mere will of the promisor. [P. 66, C. 2.]

A promisee cannot, by any act of his own, oblige the promisor to fulfil his promise, nor can there be a legal obligation to do anything, unless a liability to perform the promise, not depending on the mere will of the promisor, is imposed by the promisor upon himself by an agreement, and unless such liability is made to rest upon the services already rendered by the promisee. [P. 66, C. 2.]

In order to determine whether or not the promisor intended to impose upon himself a legal liability, the following points have to be considered, *viz.*, the nature of the services rendered, whether at the time the promise was made there was any outstanding liability on the part of the promisor to remunerate the promisee, whether the services were of a nature for which no compensation was expected and whether they had already been fully compensated for. If there was an outstanding liability, the subsequent promise will be almost conclusive evidence of the value which the parties intended to put upon the liability. [P. 66, C. 2 & P. 67, C1.]

In re Casey's Patents, Stewart v. *Casey*, (1892) 1 Ch. D. 104, followed.

(b) Trust - Creation—Mere direction to pay does not create any trust.

A mere direction in a document to which the plaintiff is not a party, to pay a certain sum to the plaintiff, is not enough to create a trust in his favour. [P. 67, C. 2.]

(c) Contract—In order to enable non-party to sue on contract he must show that he has beneficial interest in it—Agreement to pay for past services—Agreement referred to in deed of mortgage—Mortgagee acting upon it—Agreement held binding on mortgagee as he became trustee on behalf of promisee—Trust.

Where *A* contracts with *B* to pay a sum of money to *C*, the latter cannot sue *A* merely on the basis of such a contract. In order to enable *C* to sue, the contract must be intended to secure a benefit to him so that he may be entitled to say that he has a beneficial interest as *cestui que trust*. It is not possible to lay down categorically and exhaustively the circumstances which have to be considered in order to determine whether or not a contract is intended to secure such a benefit. [P. 67, C. 2.]

In re Empress Engineering Co. (1880) 16 Ch. D. 125; *Wall* v. *Bright*, (1820) 1 Jac. & W. 494; A. I. R. 1914 Mad. 701, followed.

In consideration of great services rendered to him by the plaintiff and his father, the husband of the defendant (a *zemindar*) had agreed to pay the plaintiff a salary of Rs. 20 a month during the life-time of the plaintiff. This agreement was adverted to in a deed whereunder the *zemindar* usufructuarily mortgaged his estate in favour of his wife, the latter being asked to pay the salary to the plaintiff. This arrangement was acted upon by the defendant till some time after her husband's death, when she refused to continue the payment. The plaintiff thereupon sued for the recovery of the salary:

Held, that there was an enforcible contract between the plaintiff and the defendant's husband, and that the clause in the mortgage-deed constituted a trust in favour of the plaintiff. [P. 71, C 1 & 2.]

K. Bhashyam Iyengar and *S. Srinivasa Aiyangar*—for Appellant.

P. Narayanamurti—for Respondent.

Facts.—The facts of the case appear sufficiently from the judgment.

Judgment.—The plaint is to the effect (1) that the plaintiff and his father rendered great services to the defendant's husband, the late *zemindar* of Kirlampudi; (2) that in consideration of such services the late *zemindar* agreed to give to the plaintiff a salary of Rs. 20 per mensem during the plaintiff's life-time; (3) that "accordingly the defendant's husband gave possession of his estate to the defendant and executed a deed of mortgage with possession" (*viz.*, Exhibit B on the record) "and asked the defendant to pay the allowances payable to the plaintiff." There is a reference to natural love and affection, but there is no registered document between the plaintiff and the *zemindar* and S. 25 (1) of the Indian Contract Act has not been relied upon. The prayer is that a decree be passed for recovery of the arrears of the alleged allowances after July 1907 from the estate of the late *zemindar* (who died on 2nd November 1906) in the hands of the defendant.

The written statement denies both (1) the alleged consideration and (2) generally the agreement to pay during the plaintiff's life-time, and raises the contentions (3) that Exhibit B is "indefinite and cannot be

legally enforced " and that (4) its terms were controlled by a letter, Exhibit I, alleged to be written by the late *zemindar* to the defendant, which made the alleged salary payable only during the plaintiff's good behaviour. This last contention need not be dealt with any further, as Exhibit I has been held to be spurious. It is admitted that the defendant is the heir of the deceased *zemindar*, and it is not denied that she has assets from his estate out of which the plaintiff's claim may be satisfied.

Two entirely distinct cases are alluded to in the plaint and issues which have to be considered separately, though in our opinion they ultimately depend on a determination of the same facts.

One case open to the plaintiff is that there was an unconditional and irrevocable contract between the *zemindar* and himself for payment to him of Rs. 20 per month so long as he lived; that as the *zemindar* predeceased the plaintiff, part of the contract has to be performed after the death of the promisor, that that part would be enforceable against the defendant as the legal representative of the promisor under S. 37 of the Indian Contract Act, illustration (*a*), and S. 40, illustration (*a*); and that the fact that the consideration had already been executed prior to the contract would not affect its enforceability.

The finding of the lower Appellate Court that there was a contract to the effect mentioned on which the plaintiff may sue cannot, however, be accepted, as (1) Exhibit B has been referred to even for this aspect of the case not merely as evidence of the contract between the *zemindar* and the plaintiff, but as if Exhibit B were itself the contract on which the plaintiff could sue, though he is not a party to it; (2) the defendant's position as the legal representative of the *zemindar* and as a party to Exhibit B have been confused; and (3) no attention has been paid to the question whether the promise by the *zemindar* was intended to be irrevocable or to be subject to any condition of good behaviour on the part of the plaintiff, or revocable at the mere will of the promisor. This last question is distinct from the defence based on Exhibit I, which was that, as a matter of fact, the promise had been revoked or validly altered.

The question whether or not the promise by the *zemindar* was revocable is of great importance to the question whether the promise amounts to a contract, and requires detailed examination.

The only consideration alleged for the contract is past services. The plaintiff could not, therefore, have insisted on the performance of the contract by threatening not to perform his own part of the alleged contract, as there was nothing for the plaintiff to perform. In such a case the promisee cannot, by any act of his own, oblige the promisor to fulfil his promise, nor can there be any legal obligation to do anything, unless a liability to perform the promise (not depending on the mere will of the promisor) is imposed by the promisor upon himself by his agreement, and unless such liability is made to rest upon the acts already done by the promisee.

The mere fact that at the desire of the promisor the promisee has already done something prior to any agreement (Indian Contract Act, S. 2 (*d*) cannot be sufficient to make any subsequent agreement a contract. It would not amount to a contract if it was no more than a promise to make a gift at the mere will of the promisor (Transfer of Property Act, Ss. 124, 126). Whether the *zemindar* intended to impose a legally enforceable liability upon himself, or whether he merely promised to make a series of gifts, has not been considered by the lower Appellate Court. It is clear that if the *zemindar* left to himself the option of revoking the promise at his mere will, or of otherwise putting an end to the duration of the promise, that in itself would negative any intention of imposing upon himself a legal liability (which would necessarily be independent of his own will); such a revocable promise could not, therefore, be called a contract at all.

In order to determine whether or not the *zemindar* intended to impose upon himself a legal liability, the lower Appellate Court ought to have considered (1) the nature of the services rendered by the plaintiff to the *zemindar*, (2) whether at the time that the *zemindar* made the promise upon which the plaintiff relies, there was any outstanding liability on the part of the *zemindar* to remunerate the plaintiff or (3) whether the services were of a nature for which no compensation was expected or (4) which had already been fully compensated for.

If there was an outstanding liability, then, as pointed out by Bowen, L. J., in *In re Casey's Patents, Stewart* v. *Casey* (1), the subsequent promise may be almost conclusive evidence of the value that the parties intended to put upon the liability. On the other hand, there might have been no outstanding liability either because the remuneration which was legally due to the plaintiff had already been paid prior to the promise, or because, apart from an express promise to remunerate, the plaintiff did not expect any remuneration. Whether there was any expectation of remuneration would depend (amongst other things) upon the nature of the service. The effect of S. 2 (*d*), of the Indian Contract Act upon each of these distinct sets of circumstances might be different. Where acts have been done in the past which might or might not (at the opinion of a party) support a contract, it has to be determined whether the party did, as a matter of fact, desire to place his liability on that foundation. There must be not only the intention to create a liability, but that intention must be given effect to by reference to consideration, though the consideration may be already executed.

None of these matters have been adverted to by the lower Appellate Court, nor are there findings on them from which any legal inference may be drawn either in favour of or against the plaintiff on the question, whether the *zemindar* intended to enter into an enforceable contract in consideration of past services, or whether the past services of the plaintiff were only a motive for promise, the performance of which was intended to depend on the mere will of the *zemindar*.

The second aspect of the case depends upon Exhibit B as its foundation.

In this aspect the plaintiff can succeed only if Exhibit B was such a transaction with reference to the plaintiff as to bring him within any exception to the rule which prevents a person who is not privy to a contract from enforcing it-for Exhibit B was a mortgage between the defendant and her husband, and the plaintiff is not a party to the document. The exceptions to that rule have been considered in *Iswaram Pillai* v. *Taregan* (2). For the present purpose it may be stated that this aspect of the plaintiff's case depends upon whether or not Exhibit B—or rather clause 31 thereof on which the plaintiff relies, "though in form it is a contract to which the plaintiff was not a party, was intended to secure a benefit to the plaintiff so that the plaintiff is entitled to say that he has a beneficial right as *cestui que trust* under that contract." [See per Cotton and Bowen, L. JJ., in *Gandy* v. *Gandy* (3).] To this aspect of the plaintiff's case the existence or non-existence of any prior contract binding the *zemindar* would be only indirectly relevant. The prior contract would merely indicate the history or the motive for the creation of the trust (assuming that a trust was created) by Exhibit B. The liability of the defendant would in this aspect arise (if at all) as a party to Exhibit B; her character as legal representative of the *zemindar* would not be material.

The direction in Exhibit B to pay to the plaintiff is not enough to create a trust in his favour. When *A* simply contracts with *B* to pay money to *C*, *C* cannot merely on the basis of such a contract sue *A* [*In re Empress Engineering Co.* (4)]. In order to enable *C* to sue, the contract must (as we have already said) be intended to secure benefit to the plaintiff, so that the plaintiff is entitled to say that he has a beneficial right *cestui que trust*. The circumstances which have to be considered in order to determine whether the contract is intended so to secure a benefit cannot, of course, be categorically and exhaustively laid down. But the following four considerations may be referred to [See *Wall* v. *Bright* (5), *Shaw* v. *Foster* (6) and the cases cited in *Iswaram Pillai* v *Taregan* (2)]. It must be determined (1) whether the defendant was made a trustee for the plaintiff by Exhibit B or whether her position was merely such that she might become a trustee if certain events were to take place which were contemplated in Exhibit B; (2) if she was made or had become a trustee, had she any personal and substantial interest in the property (*viz.*, as wife and presumptive heir of

(1) (1892) 1 Ch. D. 104.
(2) A. I. R. 1914 Mad. 701 = 23 I. C. 951 = 38 Mad. 753.
(3) (1884) 30 Ch. D. 57.
(4) (1880) 16 Ch. D. 125.
(5) (1820) 1 Jac. & W. 494.
(6) (1872) 5 H. L. 321.

the *zemindar* or as mortgagee) which she had a right to protect, or did the contract override any interest of her own in the property; in other words; (3) was any specific property charged with the payment to the plaintiff in which the defendant was to have no beneficial interest whatever ; (4) was Exhibit B communicated to the plaintiff, and did he accept it in lieu of any rights that he had prior to Exhibit B.

The defendant's position as the mortgagee and as the wife and presumptive heir of the *zemindar* might have important bearing on the question involved in the consideration above referred to. Assuming that she agreed to become a trustee for the plaintiff, did she agree to do so in derogation of her own present and presumptive interest in the property, or merely in so far as her rights as mortgagee and heir were not affected. For if the *zemindar* made the defendant trustee of so much of the property as would produce an income of Rs. 20 per month, and the trust was to subsist after the death of the *zemindar*, the defendant would not become absolutely entitled to that property until after the death of the plaintiff. Was that the intention of the parties? Was it intended by the *zemindar* and agreed by the defendant that the trust was to subsist only so long as the *zemindar* (and after him his representative) did not revoke the directions in Exhibit B, or was that payment to continue independently of the *zemindar's* will? Hence the real question in this aspect of the case also is whether the *zemindar* intended (at the time when Exhibit B was executed) to create a liability binding upon himself and the defendant in her dual capacity of mortgagee and the *zemindar's* representative, or whether it was a mere revocable promise without any legal obligation. This question cannot be conclusively decided by reference to clause 31 of Exhibit B, which is consistent with either view.

What is important, however, is that the plaintiff, in order to rely upon Exhibit B, has to establish not only the same facts which he would have to establish for succeeding on the first aspect of his case, but if he wishes to rely upon Exhibit B as giving him a distinct cause of action, he would also have to establish in effect that the defendant consented to become a party to the *zemindar's* contract with the plaintiff.

This becomes clearer by referring to the facts. The plaintiff claims on a two-fold basis that the *zemindar* (1) agreed to pay, (2) made what may be called a trust for payment. The trust is not explicit, and in order to determine whether the clause in question did create a trust, it has to be determined, amongst other things, whether it was meant that the *zemindar* himself and his legal representative were to have no control over the property alleged to be impressed with the trust, or whether any option was reserved to the *zemindar* and his legal representative of not acting upon the clause, and thus liberating the property in question from the trust : in other words, did the *zemindar* intend to place on himself and his legal representative an irrevocable liability to pay or did he not. S. 78 of the Indian Trusts Act is not alleged to be applicable and clauses (*b* and *e*) need not be considered.

It was argued before us for the defendant that the plaintiff's right to receive the payment as against the defendant would be co-terminous with the existence of the mortgage created by Exhibit B and that as the defendant became owner of the properties mortgaged, the mortgage must be taken to have merged (S. 101 of the Transfer of Property Act). The argument is curiously inverted from the shape it took in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (7) (and the shape it would ordinarily take), inasmuch as it is the mortgagee who asserts that the mortgage is merged and a third party who denies the merger. The question, however, whether the mortgage subsists or not, except in so far as that question is involved in those that we have already referred to, does not affect the rights of the plaintiff, for the plaintiff can sue the defendant only if and in so far as she is either a representative of the *zemindar* or a trustee on behalf of himself. It may be that the mortgage has merged and yet the trust (if it was ever created) would subsist ; on the other hand, if the direction to pay did not create a trust, then the subsistence of the mortgage would not create it. If it be the fact, as the plaintiff claims, that there was a trust created in his favour by

(7) (1884) 10 Cal. 1035=11 I. A. 126 (P. C.).

Exhibit B, then the property impressed with the trust would go out of the private property of the *zemindar* and be held by the defendant not as the mortgaged property, nor as the *zemindar's* property after his death, but as trust property: to such property, consequently, the defendant would not become "absolutely entitled" (See Transfer of Property Act, S. 101) on the *zemindar's* death, and no question of merger would arise. If there was no trust created, it is an academic question, so far as the plaintiff is concerned, whether the mortgage subsists or is merged. The question of trust is of no other importance except to establish the plaintiff's right to the allowance; for there is no question of want of assets, or of following the property in the hands of an alienee.

The lower Appellate Court must be asked to submit a finding on the question, whether the *zemindar* agreed to impose upon himself a legal liability to pay the sum of Rs. 20 a month to the plaintiff. In arriving at a finding on this question the lower Appellate Court will deal specifically with the various subsidiary questions of fact and law indicated above. The finding will be submitted in six weeks and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Rajahmundry at Cocanada submitted the following.

Finding.—In obedience to the order of the High Court calling for a finding on the question.

"Whether the *zemindar* agreed to impose upon himself a legal liability to pay the sum of Rs. 20-0-0 a month to the plaintiff".

I beg to submit the following finding:—

2. As observed by their Lordships the suit is to recover arrears of grant or salary at the rate of Rs. 20-0-0 per mensem during the plaintiff's life-time. The claim is based on two grounds :--

(1) as the promise under a contract between the plaintiff and the *zemindar*;

(2) as a beneficiary under a trust created by means of Exhibit B.

The consideration for the contract is said to be the services rendered to the *zemindar* by the plaintiff.

3. The defendant's case is, not that the services rendered should in law be held inadequate for the purpose of invalidating the contract, but her plea is that no services were rendered at all. It leaves room, therefore, for the inference that, if the plaintiff had rendered any services, the defendant does not intend to question the value put upon such services.

4. As regards the value of the services rendered, I should think the value put upon them by the parties to the contract should be accepted, taking the position, the status and the remuneration offered and other things existing in the case into consideration, unless there is any evidence of any pressure or undue influence necessitating an over-valuation, or rendering the contract void or illegal. There is no evidence, or even an allegation, that any pressure or undue influence was brought to bear upon the *zemindar* with reference to the contract under consideration. It cannot be denied that the plaintiff's family has been connected with the estate of the *zemindar* for at least two generations. The plaintiff's father was the personal guardian of a late *zemindar*. Even the interested defendant's 1st witness admits it. When the defendant's witnesses say that the plaintiff and the *zemindar* were not friends, or that the plaintiff rendered no kind of service, they do not seem to state any truth. The plaintiff is not a beggar.....He is a relation of the *zemindar* and it may be a remote relation. The defendant's 1st witness states that the *zemindar* used to address the plaintiff as *bava* (Telugu). The defendant's 2nd witness and the plaintiff state that the plaintiff had his meals in the *zemindar's* kitchen.....The plaintiff states he was allowed to go as a *rajabandhu* (Telugu). The plaintiff in his evidence states that he was a personal attendant upon the *zemindar*, meaning that he was neither a menial servant nor a monied person, but a poor relation of the *zemindar*, entitled to have an equal status so far as social relations went. He also states that the *zemindar* used to consult him on some points and take advice. He swears that he gave up his paternal estate in favour of his brother and settled at the *zemindar's* head-quarters to keep him company and to render him any services he could do. The plaintiff and the *zemindar* were friends and companions from youth. The plaintiff had

a position to maintain and a reputation to lose. He was Chairman for some years of Jagapathinagaram, which fact shows he had a social status. It is not possible to categorically state the services rendered during nearly a life-time, or to adduce any direct evidence thereof. As he made several sacrifices at the suggestion of the *zemindar*, he was promised a salary of Rs. 20 per month for his life and that promise was introduced in the mortgage-deed executed to the defendant. He swears that the understanding was that the salary agreed to be paid was not to last at the pleasure of the *zemindar* or of anybody else, but to last for his life. I do not see any reason to disbelieve the plaintiff, while there are ample grounds to discredit the evidence on the defendant's side. The defendant does not seem to dispute her liability if the plaintiff continued in her good graces. She wanted to make the contract a revocable one and put forward a document to prove the revocable nature of the contract, but that document has been held a spurious one, brought about at her instance by her interested witnesses. After all, the charge of misbehaviour brought against the plaintiff seems to be that he gave evidence on behalf of his cousin in a criminal case brought by the defendant against him. I am not sure that, if he has given true evidence, he could be charged with any misbehaviour. The frame of the 2nd issue shows that the plaintiff's case is that primarily there was a contractual liability undertaken by the *zemindar* and subsequently a transfer thereof to the defendant with her consent. With reference to the contract between the *zemindar* and the plaintiff there is not much evidence. The plaintiff alone speaks to it and a lot of other circumstances are relied upon in corroboration of the plaintiff's evidence. There is no evidence to the contrary. The *zemindar*, the promisor, is dead and the liability has been transferred to the defendant under Exhibit B with her consent. The two facts account for the paucity of more direct evidence on the contract itself. The direction to pay the plaintiff in the document Exhibit B is a circumstance to presume a contract existing behind it as basis. No doubt the plaintiff, who was no party to Exhibit B, cannot rely upon that document as the contract itself, but from the allegations in the plaint, from the frame of the 2nd issue and from his evidence, it is clear that the plaintiff relies upon a contract apart from Exhibit B, and relies upon Exhibit B as some evidence of contract which formed as the basis of the trust he alleges in his favour. The plaintiff swears that the grant was to hold good for his life and irrevocable and the plaintiff was not only being paid the amount contracted for both during the interval between the date of Exhibit B and the *zemindar's* death but also for sometime after the *zemindar's* death. There is no reliable evidence to show that there was any valid revocation of the contract, even assuming for a moment that the *zemindar* had the option to withdraw. That the intention of the parties to the contract was that it was to be in force for the plaintiff's life, is inferable from clauses 31 and 33 of Exhibit B. Considering the services rendered and the sacrifices made to the knowledge of and at the suggestion of the *zemindar* himself, it looks to me that a man in the socially high position of a *zemindar* intended, and should have intended, to bind himself to that contract rendering himself liable to pay the petty monthly allowance to the plaintiff. The plaintiff did expect to be remunerated for whatever services he rendered and he was not disappointed in his expectations.

It might be that the plaintiff was remunerated to a certain extent when it was in the power of the *zemindar* to remunerate, but there is no proof that the plaintiff had been fully compensated for the services rendered by him. I, therefore, find that as a matter of contract between the plaintiff and the *zemindar*, the latter intended to contract, and contracted, to render himself liable to pay the monthly allowance for the plaintiff's life-time. I may in this connection refer to the absence of any qualifying clause in Exhibit B such as "so long as the plaintiff renders service or at the pleasure of the payer or until revoked" as adding strength to the above conclusion regarding the intention of the parties on the other hand, past services being the consideration for the grant of a monthly allowance, no such qualifying clause was considered relevant or necessary. Exhibit I, by which the defendant attempted to qualify the grant, has been found spurious. The plaintiff admits he has not

been rendering any service to the defendant now. All these only show that the grant of allowance was absolute and unconditional for the plaintiff's life. The defendant, as her husband's heir to the estate, is bound to perform her husband's contract.

5. Again, the defendant is sought to be held liable to the plaintiff in another aspect, namely, as a trustee. The author of the trust is the *zemindar*. The defendant, the alienee of the estate, is the trustee. The plaintiff is the beneficiary and the maintenance of the plaintiff is the purpose of the trust, which is not unlawful. Exhibit B clearly indicates an intention to create a trust. Exhibit B was not a hasty or an ill-considered document. It was brought into existence after some correspondence regarding the terms. Even the defendant's 2nd witness states that the allowances sought to be payable by the defendant were.....payable only if the defendant consented to the said terms in Exhibit B. The defendant had admittedly paid the plaintiff for several months and expressed her consent thereto; thus a clear intention to create a trust in favour of a poor relation and friend of the *zemindar* is clearly inferable from the evidence on record. The defendant took the mortgage subject to the plaint liability. This suit was originally filed as a Small Cause Suit but since Small Cause Courts have no jurisdiction to try suits relating to trust, the plaint was returned and filed as an original suit in the Munsif's Court. So the plaintiff's claim, as put forward from its inception, has been a case of a trust in his favour. The circumstance that he has authorised the defendant to pledge the estate if the income therefrom should at any time fall short and be found deficient to pay any of these allowances, shows that the *zemindar* intended the grant to be binding on the estate. Reading Ss. 6 and 8 of the Indian Trusts Act, I find that the facts of this case go to establish a trust for the benefit of the plaintiff. I do not see any indefiniteness about it when the purpose of the trust suggests that that liability was to hold good for the life of the beneficiary. The wording is the same in regard to the payments to the *zemindar*, his mother and others provided for in Exhibit B. Exhibit B looks and reads as if it is a family settlement. The defendant's status as a wife is recognised in clause 29, as distinguished from that of a mortgagee. I also find that the trust is based on a prior enforcible contract. The plaintiff states that he was present at the registration of Exhibit B and there is no evidence to the contrary. Exhibit B has been proved to have been fair-copied from a draft made, approved of and sent by the defendant. The defendant has made payments of the allowances to the plaintiff for some time. Nothing more seems to be required to infer consent on the part of the trustee. The plaintiff, who knew of the execution of Exhibit B, has accepted the arrangement, which was also consented to by the defendant, but the trust, I should think, relates only to the period of the existence of the mortgagee's interest possessed by the defendant. The trust was completed when the defendant began to pay the plaintiff. In this case the defendant's rights are not only that of a mortgagee but also that of an heir to the estate. She would be a trustee as a mortgagee and not as the heir who succeeded to the equity of redemption. If the mortgage disappears, she would be the heir to the whole estate and would cease to be a trustee, but nonetheless she would be liable to pay the plaintiff as the heir of her husband, who had contracted this liability and who is not shown to have gone beyond his legal rights to charge the estate with his liability. (See Indian Contract Act, S. 25, clause 2 and Explanation 2.) No doubt, the parties did not contemplate that the *zemindar* would die and that the mortgagee would become the heir. If the heir and the mortgagee should be two different persons and if the heir happens to be in possession after the discharge of the mortgage and the consequent extinguishment of the trust, he would be liable to pay on the basis of a contract and if the mortgage subsists the mortgagee or her assignees and heirs would be liable as trustee.

6. For these reasons my finding is that the *zemindar* agreed to impose upon himself a legal liability to pay the sum of Rs. 20 a month to the plaintiff.

[The second appeal was finally heard, after the return of the finding of the lower Appellate Court, by Tyabji and Phillips, JJ.]

Messrs. *T. Prakasam* and P. *Chenchia*, for the Appellant, argued that due consideration had not been given by the

lower Appellate Court to the various points mentioned in the judgment of their Lordships calling for a finding in this case, that some of the points had not been alluded to and that such a finding could not be accepted.

Mr. *G. Venkatramiah*, for the Respondent, was not called upon.

Judgment.—We accept the finding which is one purely of fact. We see no reason for thinking that the learned Subordinate Judge did not give due consideration to the various points mentioned in the judgment calling for findings. Several, though perhaps not all, of the points have been alluded to by him.

The result is that the appeal is dismissed with costs.

S. N./R. K.

Appeal dismissed.

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AYLING AND TYABJI, JJ.

In re K. Parameswara Nambudri—Accused—Petitioner.

Criminal Revn. No. 18 of 1915 and Criminal Revn. Petn. No. 14 of 1915, decided on 26th August 1915, from the order of Sub-Divl. Magte., Malapuram, in Calendar Case No. 25 of 1914.

(a) Criminal P. C. (5 of 1898), S. 195 (1) (b)—Object of S. 195 is to safeguard that prosecution has been sanctioned after due determination and satisfaction of competent Court—S. 195 is not restricted to offences committed in pending suit but applies to fabrication of false evidence in advance.

Section 195 (1) (*b*) aims at providing that where, prior to the institution of a criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion, the complaint is one worthy of investigation. That safeguard should not be limited to cases where the offence is committed *pendente lite* but should extend also to fabrication of false evidence in advance. 12 C. W N. 822; 4 Bom. L. R. 268; 34 All. 654; and 5 I. C. 879, followed. [P. 73, C. 1.]

(b) Criminal P. C. (5 of 1898), S. 195—Prosecution for fabrication of false evidence should be sanctioned by Court in which such evidence was intended to be tendered—Uncertainty of suit being filed is no ground to dispense with sanction.

When an offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind and prior to his being charged with the commission of the offence, legal proceedings of the same nature have already commenced in any Court, it is most in consonance with the intention of the Legislature to require that the sanction of the Court should be obtained.

Where, therefore, the complaint set out that the accused wrote an endorsement on a promissory note executed in favour of the complainant, purporting to record a payment of Rs. 1,500 while no such payment was ever made and that the accused intended to use the endorsement as evidence in case the complainant brought a civil suit to recover the amount due:

Held, that the uncertainty at the time of writing the endorsement as to whether any suit could ever be brought, did not affect the completeness of the offence and that the Court could not take cognizance of the offence without the sanction of the Civil Court.

[P. 72, C. 2. & P. 73, C. 2.]

A. Sivarama Menon—for Petitioner, Public Prosecutor, for the Government.

Ayling, J.—The complaint in this case sets out that sometime in the month of *Chingom* 1087 (Malabar) corresponding to August 1912, the accused persons, the present petitioners, wrote an endorsement on a promissory note, which had been executed in favour of the complainant (present counter-petitioner), purporting to record a payment of Rs. 1,500 towards that promissory note. No such payment, according to complainant, was ever made; and his case is that the endorsement was written with the intention that it might appear in evidence in case he (complainant) brought a civil suit to recover the amount due on the promissory note.

Now assuming that complainant is in a position to make out (1) that accused wrote the endorsement, (2) that the payment which it purports to record was never made, (3) that the intention of accused was that the endorsement should appear in evidence in a judicial proceeding, then the offence of fabricating false evidence defined in S. 192, Indian Penal Code, and made punishable by S. 193, Indian Penal Code, would seem to be established. The intention above referred to, must almost necessarily be a matter of inference, but if it were shown that the accused could have had no other object than the appearance of the endorsement in evidence, *in case* a suit should be brought on the promissory note, then I do not think the uncertainty, at the time of writing the endorsement as to whether any suit would ever actually be brought, affects the completeness of the offence.

The question is whether in this case the Joint Magistrate before whom the complaint was presented on 20th February 1914 was precluded from taking cognizance of the offence by reason of S 195 (1) (*b*), Code of Criminal Procedure. I agree with my learned brother that the earlier presentation of the complaint before a Magistrate who had no jurisdiction to entertain it, may be disregarded.

It is admitted that before 20th February 1914, complainant had actually filed a suit on the promissory note (Original Suit No. 275 of 1912 on the file of the Court of the District Munsif of Walawanad) and got a decree which was at that time under appeal. The question is whether this circumstance renders the sanction of the Civil Court necessary under S. 195 (1) (*b*), Code of Criminal Procedure.

It has been argued before us that it does not, inasmuch as the suit had not admittedly been instituted at the time when the endorsement was written and the offence committed. I cannot accept this view. The object of this clause of the section seems to be to save the time of Criminal Courts being wasted, and accused persons being needlessly harassed, by erecting a safeguard against rash, baseless, or vexatious prosecutions for the offences specified. It aims at doing so by providing that where, prior to the institution of the criminal prosecution, a properly constituted judicial Tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognisance unless that Tribunal has, in effect, certified that, in its opinion, the complaint is one worthy of investigation. I see no reason why this safeguard should be limited to cases where the offence is committed *pendente lite* : and should not extend to cases of fabrication of false evidence in advance. Its desirability is just as great in the one case as in the other.

It is, of course, necessary that the "proceeding in any Court" referred to in the clause should be actually instituted before the Criminal Court is asked to take cognisance of the offence. If it is not, there is nothing in S. 195 to prevent the Court from taking cognisance of the case. And once the Court has lawfully taken cognisance of the case, its jurisdiction is not affected by the subsequent coming into existence of a circumstance which would have barred its jurisdiction, if it had existed at the time of institution.

In my opinion this was a case in which the sanction of the Civil Court was necessary, and the complaint should have been dismissed by the Joint Magistrate.

Tyabji, J.—In this case we are asked to revise an order of the Sub-Divisional Magistrate of Malapuram, dated 23rd April 1915, in which he held that he could take cognizance of the complaint before him notwithstanding that no sanction had been obtained under S. 195 of the Criminal Procedure Code.

The facts alleged in the complaint are that an endorsement had been falsely made in the handwriting and signature of the 2nd accused to the effect that Rs. 1,500 had been paid in respect of a certain promissory note; and it is admitted before us that if the complainant's story is true, then false evidence was fabricated on or about the 30th of August 1912. The complainant's case is that it was fabricated for the purpose of being used in some stage of a judicial proceeding and that, therefore, an offence under S. 193, Indian Penal Code, was committed.

The complaint was filed in the first instance before a 2nd Class Magistrate on 19th November 1912, but as he had no jurisdiction to take cognizance of it, it was transferred on the 20th February 1914 to a Magistrate of the 1st Class.

Between the date of the complaint before the 2nd Class Magistrate and the transfer to the 1st Class Magistrate's Court, civil proceedings were instituted (*viz.*, Original Suit No. 275 of 1912 in the Court of the District Munsif of Malawanad, resulting in Appeal No. 40 of 1913 which was disposed of on 13th October 1913). The promissory note is alleged to have been filed as an Exhibit in these civil proceedings.

It seems to me to be clear that the complaint before the 2nd Class Magistrate cannot be considered for fixing the date of the criminal proceedings, as that Magistrate had no jurisdiction to try the offence.

If this is correct, then the offence is alleged to have been committed on or

about 30th August 1912, civil proceedings were commenced some time after, and then on 20th February 1914 the complaint was filed before the first Class Magistrate.

It is admitted that the sanction of the Civil Court has not been obtained and the question arises whether the omission to do so, is fatal to the proceedings in the 1st Class Magistrate's Court.

Section 195 (1) (*b*) of the Criminal Procedure Code, as it has to be read in the present connection, provides that no Court shall take cognizance of any offence punishable under S. 193 of the Indian Penal Code, of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding when such offence is committed in or in relation to any proceeding in any Court, except with the previous sanction of the Court. The real point arising in this case is, whether it can be predicated of the offence in question, that it is "committed in or in relation to any proceeding in any Court," notwithstanding that the offence was complete before any proceeding had been taken in the Civil Courts.

In *Noor Mahomed* v. *Kaikhosru* (1), the acting Chief Presidency Magistrate, in his reference to the High Court, pointed out that if the clause in question is interpreted very widely, it may retrospectively render nugatory many complaints which are valid when filed; and the Court accepting the Magistrate's view, was of opinion that when the offence in question is one under S. 471 of the Indian Penal Code (use of a forged document) and the document is alleged to have been used outside the Court, no sanction is necessary. According to this case, if the document has already been used outside the Court and the charge refers to that offence, no sanction is necessary, though subsequently to such use legal proceedings are instituted and the document is produced or given in evidence in Court, and apparently though such production in Court may have been prior to the complaint. A similar view is expressed by Knox, J. in *Lalta Prosad* v. *Emperor* (2).

No authority has been cited to us having reference to S. 195 (1) (*b*). The cases brought to our notice were all under S. 195 (1) *c*).

Clauses (*b*) and (*c*) agree in some respects, but differ in this that the offence is identified in clause (*b*) by reference to the fact that it has a direct connection with some proceeding in Court, *viz.*, having been (*i*) committed in, or (*ii*) in relation to the proceeding; whereas in clause (*c*) the offence has to be connected not with the proceeding, but (*i*) with a document produced or given in evidence in the proceeding and (*ii*) by the fact that the document has been produced or given in evidence by a party to the proceeding.

In the one case, it suffices if the offence has reference to the proceeding, in the other, it must have reference to a party to the proceeding, and to a document produced or given in evidence by the party. The corresponding portions of the particular expression on which the present decision turns are also not the same; clause (*b*) runs "when the offence *is* committed," clause (*c*) "when the offence *has been* committed."

In *Giridhari Marwari* v. *Emperor* (3), the counsel for the prosecution conceded that subsequent legal proceedings altered the circumstances in regard to a charge for forgery (S. 463) so that the prosecution could not proceed, though the offence was complete and the complaint had been made before any legal proceedings had been instituted. But the concession was opposed to the decision in *Noor Mahomed* v. *Kaikhosru* (1), to which I have just referred and the Court did not in *Giridhari Marwari* v. *Emperor* (3) itself express any opinion on the question.

In *Teni Shah* v. *Bolahi Shah* (4), it is merely stated at page 480: "this forgery is alleged to have been committed in respect of a document produced at a proceeding in this Court; it comes, therefore, within the express words of S. 195 and before the petitioner could be prosecuted for forgery sanction is required." The case does not take us any further.

These decisions, as I have already said, are on clause (*c*). The offences referred to in clause (*b*) fall under two classes:—

(1) (1902) 4 Bom. L. R. 268.
(2) (1912) 34 All. 654=17 I. C. 799.
(3) (1908) 12 C.W.N. 822.
(4) (1910) 5 I.C. 879.

I. Some of them (*e.g.*, those under the Indian Penal Code Ss. 205 *et. seq.*) are such as can be committed only in or in relation to legal proceedings.

II. There are others (including the offence under S. 193, Indian Penal Code) which may be committed irrespective of legal proceedings.

It is only in regard to an offence falling under the latter head that the qualification "when such offence is committed in or in relation to any proceeding" can have any force.

Again, some of the offences falling under the second head are such that the accused must have legal proceedings in contemplation; and the offence now in question fabrication of evidence for the purpose of being used in any stage of a judicial proceeding) is obviously one of this nature.

In regard to offences of the last mentioned kind, it seems to me that the operation of the clause must be attracted to cases where, before any charge is brought against the accused, such legal proceedings have already commenced as the prosecution alleges to have been in the contemplation of the accused at the time of the commission of the offence, I can quite see that by interpreting the section in a very strict way when the offence is complete prior to there being any legal proceedings, there may appear no necessity for sanction. For it may be said that no act can be done, and no offence committed, in or in relation to any non-existent proceeding. But as my learned brother points out, the object of the section is to prevent rash, baseless or vexatious prosecutions in regard to offences for which a safeguard is available. Hence when the offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind, and prior to his being charged with the commission of the offence legal proceedings of the same nature have already commenced in any Court, it seems to me that it is most in consonance with the intention of the Legislature to require that the sanction of the Court should be obtained.

This decision is not opposed to that given in *Noor Mahomed* v. *Kaikhosru* (1). For there the offence was under S. 471—the use of a forged document—not an offence in which the accused has necessarily any legal proceedings in mind at the time of committing the offence, and the actual offence charged had no reference to any legal proceedings.

In my opinion, therefore, the Court cannot in this case take cognizance of the offence.

S. N./R. K.

Petition allowed.

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WHITE, C. J. AND SANKARAN NAIR, J.

Chitibobu Adenna and *others*—Defendants—Appellants.

v.

Garimalla Jaggarrayadu—Plaintiff—Respondent.

Second Appeal No. 931 of 1912, decided on 19th September 1913, from a decree of Tempy., Sub-Judge, Vizagapatam, in Appeal No. 129 of 1910.

(a) Contract Act (9 of 1872), S. 4—Confirmation of auction-sale contingent on principal's approval into contract of sale on approval—Offer with subsequent condition if accepted becomes contract of happening of that condition.

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval. [P. 77, C. 1.]

Where there is an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied. [P. 76, C. 2.]

(b) Contract Act (9 of 1872), Ss. 4 and 23—In absence of contract benami bid at auction would not be invalid for fraud or representation.

In the absence of any restriction in the conditions of sale that bids must be made in the bidder's own interest and not on behalf of anybody else, the mere fact that a person was acting on behalf of somebody else when he made a bid, would not make it fraudulent, nor would it amount to such misrepresentation or suppression of material facts as to entitle the other party to repudiate the contract. [P. 77, C. 2.]

(c) Specific Relief Act (1 of 1877), S. 12—Suit for enforcement of contract of sale cannot be defeated by bid being benami.

In a suit for specific performance it cannot be successfully pleaded in defence that the man who has entered into the contract for specific performance is not the man who has the beneficial interest. [P. 77, C. 2.]

(d) Landlord and Tenant—Rent—Mere exchange of *patta* and *muchilika* does not give right to recover rent.

An exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent, but the mere exchange of *patta* and *muchilika* does not give title.

[P. 77, C. 2 & P. 78, C. 1.]

B. N. Sarma for Appellants.

S. Srinivasa Aiyangar—for Respondent.

White, C. J.—Two questions, it seems to me, arise for consideration in this appeal. *First*, was there a contract between the 1st defendant and the Maharajah acting through his agents, on the strength of which the 1st defendant had a good defence to the plaintiff's claim in the ejectment and which would entitle the 1st defendant to remain in possession of the lands in question? *secondly*, assuming there was a contract, was the Maharajah, entitled by reason of the events which happened to withdraw his consent and to repudiate the contract and to deal with the lands as if no contract had been entered into?

The *first* question turns mainly on the documentary evidence. The 1st document is Exhibit I. This is a record of the sale, as I understand it, of the right of occupancy in the lands in question. The 1st defendant was the highest bidder and we find this statement in the document, that as the 1st defendant "bid the last bid for one hundred and fifty rupees, and as no other bid for more than that it (the sale) has been confirmed in the name of the highest bidder, Chitibobu Adenna, subject to the approval and orders of the special agent, Vizianagaram Samastanam." That is dated 8th July 1907. Then on August 16th we have a document which embodies the approval of the special agent. That document, which is Exhibit V, is in these terms. "The leasing out of the said *Patta* lands for settlement cowle for *Fasli* 1317 to Adenna Chitibobu (the 1st defendant) according to the *amin's* recommendation has been approved. It must be duly given effect to." On August 29th we have an application by the plaintiff for a cowle of the lands in question. That is Exhibit L. On September 6th we have a document, Exhibit H, which amounts to a grant of the lands in question to the plaintiff, who is now seeking to eject the defendants. The terms of that order are very similar to the terms of the document which embodies the approval by the special agent of the confirmation of the sale by the *amin* in favour of the 1st defendant.

Mr. Srinivasa Aiyangar has contended that Exhibit I was nothing more than an offer by the 1st defendant to the *amin*. He says that, that being so, there was no contract between the parties because the communication of the acceptance by the agent of the Maharajah was not complete (we must take it as a fact that the acceptance was not communicated to the 1st defendant). He relies on S. 4 of the Contract Act: "The communication of an acceptance is complete.....as against the acceptor when it comes to the knowledge of the proposer." If Exhibit I were nothing more than an offer made through the *amin* and all that the *amin* had said was "You have made an offer; I will communicate it to my superior officer and see if he is prepared to accept it," then, no doubt, Mr. Srinivasa Aiyangar's contention under S. 4 of the Contract Act would be good. But it seems to me that Exhibit I is a great deal more than that. It seems to me that it amounts to an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, and that, if that condition subsequent is satisfied, then there is a contract. That the special agent in fact approved is not denied.

I will take it to be the case that the onus is on the 1st defendant to establish that the confirmation which the *amin* purported to give to the sale, was an act within the scope of his authority. If the onus is on the 1st defendant—I am not quite sure that it is—we have to consider what there is to satisfy that onus. We have been referred to a document, Exhibit D, which purports to define the scope of the agent's authority. We find in it a direction to the *amin* from the special agent that "the usual auction must be held and a full report should be sent... Everything should be done subject to the approval of the undersigned." I do not think the latter sentence carries the case much further, because nobody denies that what was done under Exhibit I was subject to the approval of the special agent. We have the words "the usual auction must be held." That seems to me to indicate that what took place when the 1st defendant was the highest bidder

was in accordance with the usual practice. I think it may fairly be assumed that the terms which are embodied in the document, represent the usual practice which prevailed when a sale by auction took place by the *amin*. There can be no question that the *amin* purported to confirm the sale in favour of the 1st defendant subject to the approval and orders of the special agent, and if the onus is on the 1st defendant to show that the *amin* in so acting was acting within the scope of his authority, I think there is evidence to show that when the *amin* purported to confirm the sale subject to the condition subsequent, he was acting within the powers which were entrusted to him as agent.

As regards this part of the case Mr. Srinivasa Aiyangar cited several authorities, but I do not propose to deal with them as the question here really turns upon the construction of instrument, and upon the facts of this particular case, I think there was a contract between the 1st defendant and the Maharajah's representatives.

The *second* question is, was the Maharajah entitled in the events which happened to repudiate the contract? It is contended that he was, as soon as he ascertained that the 1st defendant had not entered into the contract on his own behalf but on behalf of another man. The learned Judge would seem to a great extent to rest his judgment on this part of the case on the ground of fraud. He says in one part of the judgment: "If the 1st defendant did not inform the *amin* that he was bidding for the 4th defendant he committed a fraud." Further on he says: "The very fact that the 1st defendant concealed from its knowledge that he had bid for the 4th defendant would amount to a fraud practised by him on it, (the *samasthanam*)." It is admitted that the 1st defendant in bidding was not acting on his own account but was acting as a name-lender for or on behalf of another party, *i. e.*, the 4th defendant. I cannot take the view of the learned Subordinate Judge that the fact that the 1st defendant was a *benamidar* acting for some other man was in itself fraudulent and would entitle the Maharajah to withdraw his consent and to repudiate the contract. The relations between the 1st defendant and the 4th defendant are clear enough. They are to be found in Exhibit VII, which is a letter from the 1st defendant to the 4th defendant in respect of this transaction and the release deed (Exhibit VIII). These documents show that the 1st defendant intended that the 4th defendant should have the benefit of this transaction and that he should have possession of the lands. As I have said there is nothing fraudulent in the fact that the 1st defendant was a *benamidar*.

Then can it be said that there was such misrepresentation or suppression of material facts, as would entitle the Maharajah to withdraw his approval and repudiate the contract. It must be observed that this is not a personal contract, that it is not one of the class of cases in which one party to the contract may be said to rely on the personal qualities or personal character of the other. It is a contract to put a man in possession of land. It is conceded that, if a formal lease had been given to the 1st defendant, nothing could have prevented him from assigning the rights which he had acquired to anybody he pleased. That being so, I am certainly not prepared to hold from the mere fact that he was acting on behalf of somebody else when he made the bid and when the sale was confirmed in his favour with the condition to which I have referred, that the 1st defendant was either misrepresenting things or suppressing material facts so as to entitle the Maharajah to say, "in view of certain facts which have been brought to my notice since I gave my consent, I withdraw my consent and repudiate the contract." There was no restriction of any sort or kind in the conditions of sale which provided that bids must be made in the bidder's own interest and not on behalf of anybody else. I do not think that any case could be found in which a defence to a suit for specific performance had been successfully set up to the effect that the man who had entered into the contract for specific performance was not the man who had the beneficial interest.

It was further contended by Mr. Srinivasa Aiyangar that the Maharajah had the right to withdraw his consent because, as I understood his argument, the title of the 1st defendant was not complete since there had been no exchange of *patta* and *muchilika* as between him and the Maharajah. No doubt an exchange of *patta* and *muchilika*

or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent. But I do not think it has ever been suggested that the exchange of *patta* and *muchilika* gives title. No doubt the parties contemplated that something further should be done after the agent's consent was given, but this was not necessary for the completion of the 1st defendant's title. For these reasons I think that the District Munsif is right and that we should set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

Sankaran Nair, J.—I agree.

S. N./R. K.

A. I. R. 1916 Madras 78

WALLIS, C. J. AND TYABJI, J.

Thrikkidiri Manakkal Vasudevan Atisseripad Plaintiff - Appellant.

v.

Konurupettamanna and *others*—Defendants—Respondents.

First Appeal No. 152 of 1913, decided on 1st April 1915, from the decree of Sub-Judge, South Malabar in Original Suit No. 26 of 1912.

Limitation Act (9 of 1908), Arts. 110 and 132—First usufructuary mortgage in 1896—Second usufructuary mortgage in consideration of old date and future advances in 1903 and also simple mortgage of some other property—Second mortgage stipulating for payment of principal and interest—Suit in 1912 for principal and interest—*Held* Art. 132 and not Art. 110 applies to claim for interest and was not barred - Usufructuary mortgage and lease to mortgagor at the same time did not affect the stipulation to pay interest.

On the 8th April 1896, the plaintiff obtained an usufructuary mortgage of items 1 to 9 of the suit properties and by a document of even date leased the same to the mortgagors. On 1st September 1903, he obtained an usufructuary mortgage of the same items 1 to 9 and a simple mortgage of items 10 to 19 in consideration of further advances, the mortgagors obtaining at the same time a fresh lease of items 1 to 9 from the mortgagee. This second document expressly made the mortgaged properties liable not only for re-payment of the principal but also for interest. In 1912 the mortgagee instituted the present suit on the foot of both the mortgages for sale of the mortgaged properties and for the realisation of the mortgage amount, including the interest due. The Subordinate Judge gave a decree for the principal and three years' rent:

Held, that the document of 1903 having made the payment of interest also a charge on the mortgaged properties, the claim for interest was governed by Article 132 and not Article 110, Limitation Act, and that the plaintiff was entitled to recover the interest under the terms of the mortgage-deed irrespective of the fact that a portion of the properties had been mortgaged usufructuarily and had been leased by the mortgagee to the defendants. [P. 79, C. 2.]

C. A. Anantakrishna Iyer and *T. Eroman Unni*—for Appellant.

C. Madhavan Nair - for Respondents.

Facts.—The facts of the case appear sufficiently from the judgment.

Wallis, C. J.—On the 8th April 1896, under Exhibit A, the defendants mortgaged with possession nine items of property estimated to yield 1,000 *paras* of paddy which, after meeting the assessment and interest, left 126 *paras* to go in reduction of the principal. On the same day, by Exhibit B, the mortgagors leased back from the mortgagees the nine items on the terms that they were only to pay the mortgagees the 650 *paras* due for interest on the mortgage and retain 350 *paras* out of which they were to pay the assessment.

On the 1st September 1903 the mortgagors executed another mortgage in favour of the mortgagees, Exhibit C, for Rs. 3,300, of 19 items of property, of which items 1 to 9 were the subject of the mortgage with possession (Exhibit A).

The mortgage was expressly recited to be given as security for the principal sum of Rs. 3,300 and the interest thereon, and as to items 1 to 9 was with possession and as to the other items without possession. On the same day the mortgagors again took a lease of the nine items which were included in both mortgages at a rental of 1,000 *paras* of paddy. On these facts the Subordinate Judge has held that the plaintiff is not entitled to a charge on the mortgaged properties for the arrears of interest due on the mortgage, although the mortgage is expressly stated to secure the interest as well as the principal, by reason of the fact that the mortgagors took the nine items on lease under Exhibit D and that the rent due by them for more than three years is barred. He, accordingly, only allowed the amount of three years' rent. The Subordinate Judge says the interest on the mortgage Exhibit C had been agreed to be paid out of the usufruct of the nine items comprised in Exhibit A, but I do not find any such provision in Exhibit C and I can see no reason for refusing to give effect to the provisions of the Exhibit C that the whole 19 items mort-

gaged should be security for the interest as well as the principal. I would, therefore, modify the decree accordingly. The similar ground of appeal as to the interest in Exhibit A was not pressed, and the other objections are untenable. The decree will be modified accordingly. The parties will pay and receive proportionate costs of the appeal.

The memorandum of objections is dismissed with costs. Time for redemption is extended to three months after the reopening of the lower Court.

Tyabji, J.—This appeal arises out of a suit for the realisation of debts secured by two mortgages, for the sale of the properties mortgaged, and for a personal decree against the mortgagors. The mortgages are Exhibits A and C on the record, dated 8th April 1896 and 1st September 1903, for the sums of Rs. 5,000 and Rs. 3,300 respectively. It has been found by the learned Subordinate Judge that the mortgages were supported by consideration, that they were executed for *tarwad* purposes, that there was necessity for their execution and that they are, therefore, binding as against the properties themselves and the interests of all the members of the *tarwad*. These findings are based on a consideration of all the evidence, including the circumstances that all the adult members (for the time being) of the *tarwad* joined in the execution of the mortgages sued upon and that "reasonable inquiries" had been made into the necessities of the *tarwad*. It is unnecessary to say more in regard to these findings than that the evidence fully supports them.

The mortgages sued upon purport to be usufructuary. But on the very days on which they were executed, the parties entered into agreements (Exhibits B and D respectively, dated 8th April 1896 and 1st September 1903), by which the usufructuary mortgagee purported to let the mortgaged premises to the mortgagor: and the latter purported thenceforth to hold possession of the mortgaged properties as tenant of the mortgagee. Thus the mortgagor continued in possession of the properties usufructuarily mortgaged, but in effect attorned to the mortgagee.

The question then arises, whether what the plaintiff was entitled to claim over and above the repayment of the principal mortgage amount was rent or interest. If it was rent then he could claim it in the present suit only for three years (the rest being barred under Article 110 of the Limitation Act); whereas if it is to be considered as interest the payment of which was charged upon the properties mortgaged, then Article 132 of the Limitation Act would apply and the claim would not be barred for 12 years.

The appellant does not press his claims under Exhibit A but relies on Exhibit C, which is explicit that the mortgaged properties were to be "the security of these Rs. 3,300 and the interest therefor." Hence the interest is clearly a charge on the mortgaged properties and Article 132 applies—not Article 110; *Kutti Umma* v. *Madhava Menon* (1) is clearly distinguishable. The mortgagor can then disclaim liability for payment of any interest (or rent) on the properties, only on the basis that the mortgagee was in possession and he ought to have collected the rents, and that as he has failed to collect the rents and their collection (as rents) is barred by limitation, he ought to be made to account as though he had collected them.

This argument can be supported in India only on the basis of S. 76 (6) of the Transfer of Property Act. I may say at once that it hardly lies in the mouth of the mortgagor or tenant (however he be styled) to say that the mortgagee must account to him on the basis of wilful default for not collecting the rent which he (the mortgagor) himself has failed to pay. If the reason of the rule is looked to, this *prima facie* view is strengthened. For the mortgagee in possession is made to account for what he ought to have (but has not) received, because, where the loss of the rents has to fall on either the mortgagor or the mortgagee and the mortgagee alone is responsible for the loss and had he used his best endeavours to collect the rents "they would have been collected and there would have been no loss on either the mortgagee or the mortgagor, in such cases it is but fair that the loss should fall on the mortgagee. I am speaking, of course, only with reference to the facts of this case and do not suggest that other aspects of the question are excluded. Now, here, in the *first* instance, by the non-collection of rents there has been no loss to the mortgagor: the mortgagor has in fact been so far saved the payments. In *Juggeewundas Keeka Shah* v. *Ramdas Brijbookundas* (2), where under

1) (1901) 11 M. L. J. 186.

(2) (1837-41) 2 M. I. A. 487=6 W. R. 10 (P. C.).

similar circumstances the mortgagee permitted the mortgagor to receive the rents instead of collecting them himself, he was held not to have forfeited his rights, *Secondly*, as I have already said, the mortgagor cannot be heard to say : "True, I did not pay the rent that I was bound to pay. But it is the mortgagee who is at fault. He ought to have compelled me to fulfil my legal obligations." This kind of virtuous indignation is out of place in the circumstances. Thus in *Hughes* v. *Williams* (3), the Lord Chancellor (Lord Erskine) said :

"Another circumstance that weighs with me is, that the mortgagor, if he knows the estate is under-let, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice was not given, but during this whole period of 16 years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be. Can the mortgagor lie by, not giving notice, that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence ? I agree to the principle that has been stated by the Solicitor-General that it would be dangerous to say, the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shown as comes up to the description of wilful default, he ought to be answerable for it."

Similar considerations tell against the mortgagor's contention in the present case, though the facts are not on all fours.

Finally, if the case must be decided with reference to abstract reasoning, it may well be urged that the mortgagee was only constructively in possession, if at all, and that for the period during which the mortgagee has not collected rents owing to the refusal of the mortgagor to pay the rents, there can hardly be said to have been any possession even constructive on the part of the mortgagee as between him and the person who was in actual possession without recognizing the rights of the mortgagee as landlord : *Juggeewundas Keeka Shah* v. *Ramdas Brijbookundas* (2).

For these reasons, I agree in the order proposed by the learned Chief Justice.

S. N./R. K.

Decree modified.

(3) 12 Ves. 493=8 R. R. 364.

A. I. R. 1916 Madras 80
Full Bench.

WALLIS, C. J., SADASIVA AIYAR AND SRINIVASA AIYANGAR, JJ.

Narayanaswamy Aiyar — Plaintiff — Appellant.

v.

D. Venkataramana Aiyar and *another*— Defendants—Respondents.

Second Appeal No. 1098 of 1914, decided on 4th August 1915, from the decree of Tempy. Sub-Judge, Coimbatore, in Appeal Suit No. 20 of 1913.

(a) Madras Estates Land Act (1 of 1908) Ss. 189 and 213—Suit for illegal distraint, by tenant or sub-tenant lies in revenue courts.

A suit by a tenant of a *ryotwari* land-owner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops or the produce of land or trees, in a defaulter's holding is exclusively triable by a Revenue Court. [P. 82, C. 2 ; P. 83, C. 2 & P. 84, C. 1.]

(b) Madras Estates Land Act (1 of 1908), Ss. 189 and 213—Suits for injunction, declaration and possession, etc., can be tried by civil Courts.

Section 189 of the Estates Land Act read with S. 213 (1) has the effect of taking such suits out of the jurisdiction of Civil Courts, which can be exercised only where the suit is for other reliefs such as injunction, declaration, possession, etc.

West Derby Union v. *Metropolitan Life Assurance Society* (1897)., 1 A. C. 647; 27 Mad. 483, followed. [P. 84, C. 1.]

(c) Jurisdiction—Creation of new jurisdiction does not oust previous one (*Obiter*).

Wallis, C. J.—The creation of a new jurisdiction does not affect previously existing jurisdiction in the absence of express provision. [P. 83, C. 2.]

N. Srinivasa Charya—for Appellant.

L. A. Govinda Raghava Aiyar—for Respondents.

Order of Reference.

Napier, J.—This is an appeal from a judgment of the Temporary Subordinate Judge of Coimbatore dismissing a suit brought by one Narayanaswamy Aiyar, a sub-lessee of certain *ryotwari* lands, against *ryotwari* owners to recover damages for an alleged illegal distraint by the defendant

for rent, the ground for the dismissal being that the District Munsif's Court had no jurisdiction to entertain the suit.

The plaintiff together with his immediate lessor had previously instituted a suit in the Revenue Court against the same two defendants under S. 95 of Madras Act I of 1908, praying for the cancellation of the attachment of the crops and costs and such further and other relief as the Court might deem fit. The Deputy Collector directed that one Palani Mudali, the other co-lessor of the plaintiff, should be added as plaintiff, and this was done. Subsequently the three plaintiffs withdrew their suit, stating that they intended to bring a fresh suit for damages before the Civil Court.

The lower Appellate Court held on the construction of S. 213 and the Schedule of the Madras Estates Land Act that the Civil Court had no jurisdiction.

The Madras Estates Land Act, I of 1908, was passed to amend and declare the law relating to the holding of land in estates. An estate is defined by S. 3 of the Act as being the whole or any part of any permanently settled estate or *zemindari*, any unsettled *palaiyam* or *jaghir*, certain plots in village *inams* and any portion of such villages. Admittedly, held under *ryotwari* tenure does not come within the definition of an estate. We find, however, that one chapter of the Act has been made partially applicable to such holdings. This is Chapter VI, which deals with the recovery of rent by suit or by distraint and sale of moveable properties or of the holding. S. 77 of that chapter entitles a land-holder to bring a suit before the Collector for the recovery of the arrear of the rent and also to distrain the produce of the land or trees in the defaulter's holding. The distraint complained of in this suit was of the produce in the defaulter's holding, though the crops distrained belonged to the sub-lessee.

S. 96 entitles a defaulting *ryot* or cultivator to file a suit before the Collector to set aside distraint within 15 days from the date of the service of notice by the sale officer on the defaulter under S. 95. It was under this provision that the lessee from the *ryot* and his sub-lessee brought their suit in the Deputy Collector's Court. S. 134 is as follows:—"The provisions contained in this chapter for the recovery of rent,.....by distraint and sale of moveable property shall apply, as far as may be,...to the recovery of rent by a land-owner under *ryotwari* settlement.....from a tenant from whom he has taken a written agreement..." The first thing to be noticed is that S. 134 does not extend to a *ryotwari* land-owner the whole of the rights given by Chapter VI. It does not entitle him to bring a suit before the Collector to recover his rent. Nor does it entitle him to exercise the powers given to a land-holder of selling the holding. The omission of these two powers of a land-holder from the section throws, in my opinion, considerable light on the extent to which the other sections of the chapter are applicable. The Revenue Court has no jurisdiction to entertain a suit for rent and it has no jurisdiction to permit the sale of the holding; that is to say, where the remedy requires the intervention of the Collector, the procedure is not applicable to *ryotwari* holdings. No permission or intervention of a Revenue Officer is required for the exercise of the right of distraint and it is only after the property has been distrained and it is sought to recover the amount by the sale of the property, that any public officer intervenes. That is the sale officer referred to in S. 79, a statutory official created by Act VII of 1839. This officer's position in analogous to that of a sheriff with regard to sales in execution. S. 2 of the Act referred to, is as follows:—"All Tahsildars shall be vested with powers of Commissioners for the sale of property distrained for arrears of the rent or of revenue..." His functions have always been the same whether he was selling the property taken by the process of distress under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) or the Revenue Recovery Act (Madras Act II of 1864) (*vide* S. 2 of the former Act and S. 9 of the latter). It is, therefore, clear that so far as the procedure for recovery of arrears by distraint is concerned, there is no intervention by the Collector. Turning again to S. 134 of the Madras Estates Land Act, we find that the provisions applicable are limited to those for the recovery of rent and they are made applicable by sub-clause 2 to the recovery of rent. No section in this chapter which does not provide for the recovery of rent is applicable to the case of *ryotwari* tenants and no portion of any section which does not deal with the recovery of rent is applicable either; and further, the language being "shall apply to the recovery of rents by a land-owner," any provision under which a person whose property has

been distrained can seek relief is not applicable either, such provision not being one for the recovery of rent by a land-owner. This conclusion based on the strict language of the section is, in my opinion, fortified by the examination of the procedure in the remaining sections. In my view, all the section does is to make statutory provision for the exercise of the right of distraint by a *ryotwari* land-owner and to provide certain formalities for the protection of the lessee. It was not intended to give the Revenue Court any jurisdiction to entertain a suit either by the land-owner to recover the rent or by the tenant to set aside the distraint. I now turn to the other provisions of the Act. S. 189 provides that a Collector shall hear and determine all suits and applications of the nature specified in Parts A and B of the Schedule. The Schedule contains an enumeration of suits. One of them is by a *ryot* to set aside distress under S. 95. This description obviously does not apply to to a *ryotwari* tenant, for admittedly he is not a *ryot* within the meaning of the Act. And it is a fair observation that the failure to provide for a suit by any other person to set aside a distress is an indication that the procedure under S. 95 was not intended to be made applicable to persons other than *ryots*. The last description in Schedule A is a suit for damages not otherwise provided for. The Subordinate Judge applies S. 213 to description of suits—the language of S. 213 is "any person deeming himself aggrieved by any proceeding taken under colour of this Act, or by neglect or breach of any of its provisions, shall be at liberty to seek redress by filing a suit for damages before the Collector"—and holds that S. 189 ousts jurisdiction of the Civil Court with reference to any dispute or matter in respect of which such suits might be brought. In my opinion, this is giving too wide a meaning to the words " for damages not otherwise provided for." S. 213 itself does not bar the right of action in a Civil Court, unless that right of action is taken out of the jurisdiction of the Court by the Act. If the words in the Schedule are to be given the wide meaning contended for, then the provisions of sub-Ss. 2 and 3 of S. 213 are nugatory. Therefore, some limitation must be put on the words " damages not otherwise provided for." It is extremely difficult to say what those limitations are and I do not propose to consider any case other than the one before us.

As pointed out above, nothing but the provisions laying down the procedure for distress is incorporated in the law governing the relations between a *ryotwari* land-owner and his tenant. It seems to me, therefore that the Legislature, which refrained from extending the right of suit under S. 95 to such a tenant, cannot have intended to make the Collector's Court the sole Court in which a tenant could seek damages for an illegal distraint. The suit under S. 95 is one to contest the distraint. In nature it does not differ from one for damages, and as the former is not extended to the *ryotwari* tenant, I cannot think that the Legislature intended to bar his suit in the ordinary Court by the wide words " for damages not otherwise provided for " in the Schedule. I am inclined to the view that the Schedule suits are all suits with reference to land in an estate. As the matter, however, is not free from doubt, and as my learned brother feels more difficulty in the matter than I do, I agree that the following question be referred to a Full Bench.

" Is a suit by the tenant of a *ryotwari* land owner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops or the produce of land or trees, in a defaulter's holding solely cognisable by the Revenue Court. "

Sadasiva Aiyar, J.—I also think that it is appropriate that the question should be settled by a Full Bench. While S. 78 (paragraph 1) of the old Act VIII of 1865 allowed an unqualified right of resort to the Civil Court to obtain damages for acts " professedly done under the authority " of that Act, notwithstanding the " *summary suit* " remedy given by S. 49 of that Act to be filed before the Collector for that same relief of damages, S. 213, clause 2, of the Estates Land Act gives a right of action in the Civil Court only in cases " not taken out of its (the Civil Court's) jurisdiction by this Act. " Further, suits before the Collector are not distinguished by the designation of " summary suits in the new Act, that is, distinguished from suits before the Civil Court. It seems also clear that resort to Civil Courts was intended by the new Act to be discouraged as far as possible. Suits which are not *for damages*, though arising from acts professedly done under the Statute, lie no doubt ordinarily in the Civil Courts [See *Gouse Moideen Sahib* v. *Muthialu Chettiar* (1)].

(1) A. I. R. 1914 Mad. 657 = 21 I. C. 762.

This second appeal coming on for hearing as per above order on the 2nd and 3rd August 1915, upon perusing the said Order of Reference, and upon hearing the arguments of Mr. *N. Srinivasa Charya*, for the Appellant, and of Mr. *L. A. Govindaraghava Aiyar*, for the Respondents, and the question having stood over for consideration till this day, the Court expressed the following:—

Opinion.

Wallis, C. J.—I do not think that the fact, the proceedings for the recovery of rent by distraint and sale of moveable property which have given rise to this suit, were taken by a land-owner under *ryotwari* settlement pursuant to S. 134 of the Madras Estates Land Act, or the fact that the present suit was instituted in respect of proceedings so taken not by a tenant of such land-owner but by a sub-tenant, makes any difference, because in my opinion the effect of S. 134 is to enable such a land-owner, though not governed by the general provisions of the Act, to avail himself of the summary remedy thereby provided for the recovery of rent, and the effect of S. 213, sub-S. (1), is to give "any person deeming himself aggrieved by any proceedings taken under colour of this Act" a right to sue for damages before the Collector, words which are sufficient to give the Collector jurisdiction in a suit of this nature if filed before him.

The question is as to whether suits as to which jurisdiction is conferred upon the Collector under S. 213 (1) are withdrawn from the jurisdiction of the Civil Courts by S. 189.

Sub-Ss. (2) and (3) of S. 213 seem at first sight to suggest that it was contemplated that there should be concurrent jurisdiction in the Collector and the Civil Court in suits falling under sub-S. (1), but as against this we have the express provisions of S. 189, which after collecting in Schedules A and B all the suits and applications to be entertained by the Collector mentioning in each case the governing section, goes on to provide explicitly that no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute—matter in respect of which such suit or application might be brought or made. These provisions are express and I cannot find anything repugnant to them in the terms of S. 213 which would justify us in holding that suits which fall under sub-S. 1 of that section are triable concurrently by the Civil Court. It is, I think, immaterial whether the result of so holding is to leave little or no effective operation for sub-Ss. (2) and (3), for these sub-sections are in the nature of provisoes, and as pointed out in *West Derby Union* v. *Metropolitan Life Assurance Society* (2), it would not be legitimate to cut down the operative portion of S. 189 to which these provisoes do not in terms apply merely because otherwise the provisoes would be "meaningless and even senseless." What seems to me probable in this case is that sub-Ss. (2) and (3) which were drafted in place of Ss. 49 and 78 of the old Act, were retained by inadvertence after the jurisdiction of the Civil Court had been taken away by S. 189 in its present form. After all both sub-S. (2) of S. 213 and S. 78 of the old Act are nothing but statements of a well-known rule of statutory construction that the creation of new jurisdiction does not affect previously existing jurisdiction in the absence of express provision. I desire to say, though the point in my opinion does not arise for decision, that the effect of provisions of sub-S. (2) is not to preserve a concurrent jurisdiction in the Collector in the case of suits under S. 91; in my opinion suits under S. 91 are exclusively within the jurisdiction of the Civil Court and do not come within the provisions of sub-S. (1) of S. 213 giving the Collector jurisdiction, because I think that apart from S. 91, no suit would lie to call in question lawful orders of the Collector passed under S. 89 or 90 on the ground that the plaintiff was aggrieved by such lawful orders. The proceedings contemplated under S. 213 (1) are in my opinion unlawful proceedings done under the colour of the Act.

Next as regards sub-S. (3), I find it difficult to accept the suggestion that the Legislature went to the trouble for enacting sub-S. (3) for the purpose of saving the right to sue in a Civil Court for reliefs other than damages in respect of causes of action as to which suits for damages lie before the Collector under sub-S. (1), even if sub-S. (3) as drafted, permits of such suits. These considerations here do not affect my judgment in the order in question and I would answer the reference in the affirmative.

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(2) (1897) A. C. 647.

Sadasiva Aiyar, J.—It seemed to be admitted in the arguments on both sides that clause (2) of S. 213 of the Estates Land Act and the proviso which forms clause (3) of the same section, are somewhat ambiguously worded.

Reading, however, S. 213 (1), S. 189 and clause (2) of Schedule A together, I feel little doubt that the present suit (which is a suit seeking redress *by way of damages* and brought by a person feeling himself aggrieved by proceedings taken under the colour of Ss. 77 and 134 of the Act) has been taken away out of the jurisdiction of the Civil Court. Clause 2 of S. 213 preserves the Civil Court's jurisdiction only in cases "not taken out of its jurisdiction by this Act", and suits *for damages* brought on particular causes of action are so taken away by S. 189 of the Act read with S. 213 clause (1), and Schedule A No. 21. In other words, clause 2 of S. 213 saves the Civil Court's jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies (such as injunction, declaration, possession, etc.), if any, open to the plaintiff under the ordinary law. Similar provisions in other rent, revenue and similar special Acts showing a reluctance on the part of the Legislature to take away the jurisdiction of Civil Courts over suits involving claims for other than pecuniary damages, while conferring jurisdiction on Revenue Courts to entertain suits for the award of pecuniary damages in particular cases, can, it seems to me, be quoted in support of the above view. The proviso forming clause 3 of S. 213 takes away the jurisdiction of the Civil Court even in respect of cases claiming other redress than pecuniary damages, if the redress of damages had been already claimed by the plaintiff in a suit filed before the Collector under clause 1 of S. 213.

After giving my best consideration to the whole matter, I agree with my Lord that the present suit is exclusively cognizable by the Revenue Court. It is unnecessary for the decision of this case to express a final opinion on the questions whether the remedy by a suit in the Collector's Court to set aside a distress under S. 95 can be availed of by a Government *ryot's* tenant whose moveables have been distrained under S. 77 and whether assuming that he could do so, the jurisdiction is an exclusive one in the Revenue Court, Schedule A, clause 10, referring only to a suit by a "*ryot*" under S. 95, and the word "*ryot*" being defined in clause 15 of S. 3 of the Act so as to exclude a Government *ryot's* tenant from its connotation.

Srinivasa Aiyangar, J.—Defendants Nos. 1 and 2, who are land-owners under *ryotwari* settlement with the Government, availing themselves of the powers given them under S. 134 of the Madras Estates Land Act, distrained the crops on the land of the plaintiff, their tenant. The distrained crops were subsequently sold. The plaintiff complains that the distraint was illegal and files this suit for damages in the District Munsif's Court, Tirupur. The question is whether a Civil Court has jurisdiction to entertain a suit of this description. The solution depends on the correct interpretation of Ss. 213 and 189 of the Estates Land Act. Clause 1 of S. 213, which corresponds to S. 49 of the repealed Rent Recovery Act, Madras Act VIII of 1865, gives jurisdiction to Revenue Courts to entertain suits for damages filed by persons deeming themselves aggrieved by any proceedings taken under colour of the Act. That the present suit is a suit of that nature, scarcely admits of doubt and the plaintiff, if he had chosen, could have filed this suit before the Collector. But this would not take away the jurisdiction of the ordinary Civil Courts and clause 2 of S. 213, which corresponds to the 1st clause of S. 78 of the repealed Act, provides that "this section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act." Now S. 189 of the Act takes away the jurisdiction of the Civil Courts in respect of suits of the nature specified in Part A of the Schedule to the Act and suits of the nature now in question are specified in the Schedule (see No. 21 of the Schedule). The words of the section are quite clear and unambiguous, and if the matter had rested there, there could be no doubt that a Civil Court could not take cognizance of this suit. But it is said that this construction renders the proviso to S. 213 meaningless, because there can hardly ever be a case to which it would apply. I think it quite possible to give a meaning to the proviso consistent with the construction I put on S. 189. Persons deeming themselves

aggrieved by proceedings taken under colour of the Act are not confined to relief by way of damages. They may be entitled to ask for other reliefs such as an injunction, a declaration, or recovery of the specific property. [See *Zemindar of Ettyapuram* v. *Sankarappa Reddiar* (3).] Even if the appellant is correct in his contention that the proviso would be rendered nugatory by the construction I put on S. 189, following the principle of the decision in *West Derby Union* v. *Metropolitan Life Assuranee Society* (2), I should still come to the same conclusion as the words of S. 189 are quite clear and unambiguous.

I agree to the answer to the reference.

S. N./R. K.

Reference answered in the affirmative.

(3) (1904) 27 Mad. 483.

A. I. R. 1916 Madras 85

WALLIS, C. J. AND HANNAY, J.

K. R. V. Krishna Rao Bahadur — Defendant—Appellant.

v.

Muthangi Buchi Rammayya Garu and *others*—Plaintiffs—Respondents.

First Appeal No. 20 of 1912, decided on 6th January 1915, from the decree of Govt. Agent, Godavari in Original Suit No. 1 of 1910.

(a) Evidence Act (1 of 1872), Ss. 63 and 65—Secondary evidence of lost public document is admissible when no certified copy is preserved.

Where a certified copy of a lost public document is not preserved, other secondary evidence of the contents of it is admissible. 5 Cal. 568 and 6 Mad. 80, Foll. [P. 87, C. 1.]

(b) Evidence Act (1 of 1872) Ss. 63 and 65—Copies of orders issued to other offices and kept in register in course of business shall be presumed to be correct and are admissible as secondary evidence under Ss. 63 and 65.

Orders issued by public officers in the discharge of official duties kept together in a register in the usual course of business should be presumed to be accurate copies of the original public documents and are admissible in evidence as "secondary evidence" of such public documents under Ss. 63 and 65 of the Evidence Act. [P. 87, C. 1.]

N. Subba Rao, P. Narayanamurti and *P. Somasundaram*—for Appellant.

M. O. Parthasarathi Aiyangar, S. Srinivasa Aiyangar and *T. Rama Chandra Row*—for Respondents.

Judgment.—This is an appeal against a decree of the Court of the Government Agent of Godaveri in a suit brought by the plaintiffs to recover possession of a village which, they allege, was granted to their predecessors by the predecessors of the defendant, the *zemindar* of Polavaram, by a permanent grant in the year 1797 and was confirmed to them by an ancestor of the present *zemindar* by a *takeed* of the year 1830. The Government Agent has written a very careful and exhaustive judgment in which the whole evidence is dealt with. The general effect of the plaintiffs' evidence is to show that they have held this village for a great many years on an annual payment of Rs. 8 and have claimed to hold it as a *mokhasa* village paying a *kattubadi* of that amount. We have Exhibit Y which is a deed of gift in 1846, in which it is styled their ancestral *mokhasa* property. We have Exhibit Z of 1886, a Will by which a share in this village was bequeathed, that Will was contested in a suit in which Exhibit AA is the judgment. Then, we have registered leases Exhibits A and HI, of 1872, by which the village was leased by Chotabi, the then representative of the family as her *mokhasa* property; and by Exhibit B in 1883, she sold it to the vendor of the present plaintiff. Chotabi died in the year 1892 and it was not for another ten years that the present defendant claimed to resume the village. On the other hand, the defendant relies upon the fact that the numerous *zemindari* accounts which he has put in evidence, including lists of the *zemindari* villages, nowhere treat this as a *mokhasa* village. In some earlier accounts, several *mokhasa* villages are entered but this is not. But in some of the later accounts, it is treated as an *ijara* village, that is to say, a village which has been leased under an *ijara* or lease-deed to the predecessors of the present holder.

It is not necessary to go into the whole of this evidence here. Roughly, the effect of it is that the village is not treated in the *zemindari* accounts and documents which have been put in evidence as a *mokhasa* village anywhere. In this state of things the plaintiffs rely upon secondary evidence of their title and the Agent has accepted that evidence. In 1866 the predecessors of the paintiffs undoubtedly put in a claim before the *Inam* Com-

missioner that this village should be registered as an *inam* village, but they put it in through the wrong Tahsildar and the petition was returned for presentation through another Tahsildar, and it is impossible to say what became of it. The case for the plaintiffs is that with that petition they filed the original *patta* of 1797 and the *takeed* of 1830. Nothing has been found about the case in the records of the *Inam* Commissioner's office. I do not think that any inference can be drawn one way or the other from the fact that the *inam* was not enfranchised. There is nothing in the evidence to suggest any reason why this particular village should be exempted from liability for the payment of revenue to Government, whether that revenue was paid by separate assessment or by treating the village as part of the *zemindari*. However the plaintiff's case is, as I have said, that the *patta* of 1877 and the *takeed* are lost and they claim to give secondary evidence of those documents.

They rely in the first place upon Exhibit EE which, the appellant strongly contends, is inadmissible in evidence. Exhibit EE was produced in Court from the records of the Collector. The evidence is that the estate came under the management of the Court of Wards under Regulation V of 1804. The Collector was the agent of the Court of Wards and was the person who was in charge of the *zemindari* while it was under the management of the Court of Wards. Exhibit EE purports to contain copies of a number of orders relating to the Polavaram *zemindari* which, as the Government Agent states in his judgment, are dated from the 27th of December 1832 to the 20th of May 1833. It was produced in Court from the Collector's office about a year before the actual hearing on a summons taken out by the plaintiff and, therefore, the defendants had the fullest opportunity to examine it and detect any traces of forgery, and it was marked at the close of the plaintiff's case, apparently without objection. The Government Agent in his judgment is under the impression that its genuineness was admitted. Mr. Subba Rao who conducted the case has stated that this is not so, and we accepted his statement; at the same time we cannot think that the objection against its genuineness was very strongly pressed at that time as distinct from its admissibility. The Government Agent says "the register" (Exhibit EE) "is like numbers of similar ones in the Collector's office and was kept in the ordinary course of business as it was then carried on." My learned brother who is sitting with me has seen similar records from the Vizagapatam Goverment Agent's office and the Bench clerk's statement is to the same effect. I cannot but think that if its genuineness in this sense had been challenged, any number of registers might have been produced to show that it is, as the Government Agent says, "like numbers of similar ones in the Collector's office records and was kept in the ordinary course of business as it was then carried on." That it was kept in the ordinary course of business can, I think, be inferred from an inspection of the document itself. It is a record— a necessary record too one might say—of the orders passed by the Collector as Agent of the Court of Wards with reference to this Polavaram Estate, which was then under his charge. Some of the orders purport to bear the signature of the Collector, A. Crawley. This particular order and some of the other orders do not purport to bear his signature. It was produced from proper custody and the defendants had abundant opportunity to inspect it and if there was anything suspicious about it, we have not the least doubt it would have been brought to our notice, more especially as in some other cases the interpolation of documents in the Collector's office has been brought to light. We see no reason whatever on an inspection ourselves of this document for doubting its genuineness.

The next question is whether it is admissible. The first objection taken to its admissibility was that under the Evidence Act this was a public document and that in the case of public documents under the terms of S. 65 a certified copy of a public document, and no other secondary evidence, was admissible even when a public document had been lost. There is something to be said for this contention on the wording of the section, but this contention has been overruled in a very lucid judgment by Mr. Justice Wilson, which is reported in *In the matter*

of a collision between the "Ava" and the "Brenhilda" (1), and this Court has taken the same view in *Kalandan* v. *Kunhunni* (2). It would, I need hardly say, be a most unfortunate state of the law if no secondary evidence of the contents of a lost public document were admissible unless a certified copy happened to have been preserved. The Legislature can never have intended such a state of things and Mr. Justice Wilson has given good reasons in his judgment for holding that it is not the right construction of the section. If that be not so, then the case comes within the provision in the section that any secondary evidence of the contents of a document is admissible, because then it comes within clause (*c*) (of S. 65), that is to say, the case where the original has been destroyed or lost.

Then, Mr. Subba Rao contends that if this be so, still the secondary evidence must be secondary evidence of the nature defined in S. 63. Now, S. 63 says, "secondary evidence means and includes. ...(3) copies made from or compared with the original." Mr. Subba Rao contends that in the present case it is not shown that this Exhibit EE is a copy prepared from the original. Mr. Rangachariar on the other side contended that the register was itself the original, but we are unable to accept that contention. We think, however, that it is shown that this document which is produced from the proper custody was a register of orders of the Collector relating to this *zemindari* which was kept in the ordinary course of business by the Collector as agent of the Court of Wards. Now, S. 114 says that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case," and it is unnecessary to bring the case within any of the very numerous illustrations which are appended to it. In this state of things we feel justified in presuming that Exhibit EE is an accurate copy of the order which was actually issued by the agent to the Court of Wards. That order is not now forthcoming; notice has been given to the defendants to produce it, and they have not produced it, nor is there any reason to presume that it is in existence. In these circumstances we think that Exhibit EE may be admitted as secondary evidence of the order which was issued by the Collector as agent of the Court of Wards.

Turning to Exhibit EE, it sets out that the plaintiff's predecessor had presented a petition saying the said village was granted to her father as *inam* under a *patta* by Mangapathi Devu Garu, that is, the *zemindar* of the year 1797; since then, they had been enjoying it and owing to the death of the late proprietor, Jagayya Garu, that is the predecessor of the present defendant, the *taluq* was under attachment and that the Amin prevented the collection of rents, and prayed that her documents may be perused and orders issued for payment by the *ryots* as usual. In respect of this the following documents were produced, *viz.*, one *patta* granted in 1797 and a *kadayah* and one document by the late proprietor showing that the village was re-granted to the petitioner. It is, therefore, ordered that there should be no obstruction to the petitioner collecting the rents of the village and the *kattubadi* of Rs. 8, that is, the quit-rent payable by her should be entered in the accounts as the demand for the village. Thus the *mokhasa* title of the plaintiffs was asserted and recognized by the agent of the Court of Wards on a perusal of their title-deeds which are now lost.

As the Government Agent has pointed out, the genuineness of Exhibit EE is strongly corroborated by Exhibit DD which is a copy of a judgment of the District Munsif's Court of Seethanagram in the year 1835 in Original Suit No. 122. One half of the page of this judgment has been destroyed but the other half remains perfectly legible and, therefore, it is possible to gather what the nature of the suit was from what remains, and there are also certain statements which clearly appear. The suit would appear to have been brought by the predecessors of the plaintiffs against the *ryots*, who apparently had refused to pay the plaintiffs and had attorned to the then *zemindar* who on that account was made the first defendant but did not trouble to appear. The fact that he did not appear goes to show that he

(1) (1880) 5 Cal. 568.
(2) (1883) 6 Mad. 80.

admitted the plaintiffs' case. At page 97 of the printed documents; Exhibit DD clearly refers to the grant of 1797 and says that it fixed an annual payment of 5—probably pagodas—on the village ["and got a permanent *patta* written"] and it also mentions that a *takeed* was written, which evidently refers to the *takeed* of 1830 which is mentioned in Exhibit EE. And, as appears from the list of documents appended to the judgment, both these documents were then produced in Court. The second one is described as 'executed on the 24th September 1830, *Vikruti* . . . . by . . . . and Jagayya Garu'—that is, the defendant's predecessor. The judgment is given against the tenants and there is also some mention at the close of the judgment of '*kattubadi*' of the village, which is the proper term for the quit-rent payable by a *mokhasa* village, but is not the proper term for rent payable under an *ijara*.

On this evidence, the Government Agent has come to the conclusion that the plaintiff's case is right and that the village was the subject of permanent grant in 1797, which was confirmed in 1830 at a *kattubadi* of Rs. 8. This being so, the mere fact that the nature of this tenure is not recognised in the *zemindar's* accounts goes for very little and certainly cannot counterbalance the fact of the continuous assertion of title by the plaintiffs, confirmed as it is by this document, Exhibit EE, showing a recognition of the *mokhasa* tenure by the agent of the Court of Wards when in charge of the estate.

We may refer to another fact which the Government Agent relies on as strongly supporting the plaintiffs' case, that is, although the *zemindar's* accounts show the predecessors of the plaintiffs as *ijardars*, yet there was never any exchange of *pattas* and *muchilikas* between them as there was in the case of every other *ijara* in the estate. The explanation put forward that during most of this time, the *ijardars* were two Mohammadan ladies who sometimes lived at Rajahmundry and sometimes at Hyderabad seems altogether insufficient. These ladies were capable of executing other documents and were capable of executing *muchilikas* too, if they had recognized that the tenure was *ijara*.

The defendants rely upon Exhibit VIII, which is an *isthiharnama* or a sort of proclamation or public notice of the year 1853 which describes the plaintiffs' predecessors as holding under a cultivation lease. The Government Agent thinks this may have been a merely erroneous assertion, but, however this may be, we are not inclined to attach much importance to it.

The defendants also rely upon Exhibit XVII series—they are three receipts given by the defendants for the payment of Rs. 8 and they do undoubtedly treat this as *ijara cist*. Those receipts were produced apparently by cultivators who held under the lessees of the plaintiff's predecessors and they are not documents which ever got into the plaintiffs' hands or got to their knowledge. We do not think that these three receipts can be sufficient evidence of the fact that the plaintiffs' predecessors agreed to hold under an *ijara* tenure instead of under *mokhasa* tenure, which they always claimed to hold under in all the documents which they executed and which, according to the evidence, in our opinion, has been proved to have existed.

On the whole, we agree with the conclusion arrived at by the Government Agent and dismiss the appeal with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 88

WALLIS, OFFG. C. J. AND KUMARASWAMI SASTRI, J.

A. R. R. M. V. Arunachellam Chetti and *others*—Defendants—Appellants.

v.

Venkata Chelapathi Guruswamigal—Plaintiff—Respondent.

Civil Appeals Nos. 31, 33, 65 and 66 of 1909, decided on 10th August 1914, against the decrees of Sub-Judge, Madura East, in Original Suits Nos. 51 and 50 of 1906.

(a) Hindu Law—Religious endowment—Management—Grant of villages to plaintiff in trust for an endowment—Villages were actually managed by defendants or their nominees—Plaintiff treated as religious head—Held defendants acquired no right of management jointly with plaintiff—Defendant's possession could not be adverse to plaintiff—Defendants could not be allowed to say that their voluntary management

was adverse to plaintiff—(Per Kumaraswami Sastri, J.)—Head of Patharakudi *Mutt* has *prima facie* right to possession unless transfer of adverse possession is proved.

The villages in suit were granted to the plaintiff's predecessors-in-office and were managed and enjoyed by them for a lengthy period subject to the trusts of the endowment. The defendants, the Nattukottai Chetties, were supplementing the income derived from the endowments and coming to the assistance of the plaintiff as their religious superior and it appeared from the *inam* register that the Chetties were managing the affairs of the *mutt* and the villages through managers or trustees elected by the Chetti community:

Held, (Per *Wallis, Offg., C.J.*,) that the defendants Chetties failed to show that they had acquired the right of joint management with the plaintiff, though the management had in recent times been left largely in the hands of individual Chetties who were not shown to have been appointed in any particular way. [P. 91, C. 1 & 2.]

Held, also, that the part taken by the Chetties could not be held as adverse to the plaintiff. [P. 92, C. 1.]

Held, further, that the Chetties could not be allowed to press their assistance on their religious head and on the strength of that assistance turn round and say that they had ousted him from the management of the institution by adverse possession and that they only were entitled to manage in trust for the plaintiff as the sole beneficiary during his life-time of the entire income of the villages subject to the maintenance of the institution. [P. 93, C. 1.]

Quære.—Whether the right of joint management by prescription agai st the holders of an office can be acquired by a community? [P. 90, C. 1.]

Per *Kumarasami Sastri, J.*—From the history of the Patharakudi *Mutt* the head of the *mutt* has a *prima facie* right to possession unless it can be shown that he has either parted with his rights or that adverse rights have been acquired by third parties. [P. 96, C. 1.]

(b) Hindu Law—Religious Office—Appointment—Matathipathi usually appoints him successor Patharakudi *Mutt* in absence of appointment success is chosen by Brahmins and approved by chetties.

The usual practice in *mutts* is for the *matathipathi* or the head of the *mutt* for the time being to appoint his successor. [P. 96, C. 2.]

Where one has failed to be nominated in the Patharakudi *Mutt*, the appointment is made by the *Brahmins* and the Chetties in co-operation, the *Brahmins* selecting a suitable person and the Chetty community approving of the choice and requesting the *Brahmins* to do the needful in the matter of preparing the selected candidate for the office. [P. 96, C. 2.]

(c) Adverse possession—Religious endowment—In question of adverse possession relations of parties has to be considered.

In dealing with the question of adverse possession the relationship between the parties has to be borne in mind. Where the Chetties were interested in the affairs of the *mutt* and were allowed to manage the properties by the head of the *mutt*, there is no reason to presume that such management was adverse to the Guru. [P 97, C. 1 & 2.]

(d) Hindu Law—Religious endowment—*Mutt*—Properties dedicated to idol—Office of Dharmakartha may be acquired by adverse possession—But where properties are dedicated to head of *Mutt* in trust for idol management by others would not be adverse—Right to property or its management is not lost by stranger's management with permission for any length of time—Management if not hostile does not help acquisition of any right.

Where properties are dedicated to an idol, the office of Dharmakartha may be acquired by adverse possession, but where properties are given to the head of a *mutt* and vest in him absolutely, subject to the application of the income to certain purposes, the person who manages the property on behalf of the *mutt prima facie* manages it also on behalf of the Gurukkal who is the sole person entitled to the properties. [P. 100, C. 1.]

Mere length of time of management on behalf of another would not deprive the owner of the property of his power to put an end to the management and assume the same himself. [P. 100, C. 1.]

The mere fact that like many persons of his class the plaintiff chose to lead a life of indolence without troubling himself about the management of the *mutt* properties, which he found in capable hands at the time he succeeded to the office, will not prevent him from resuming the management though he might be bound by the acts of the Chetties during the period of their management. [P. 101, C. 1.]

The acts of management, such as leasing properties, paying taxes, etc., are only incidental to the management of the properties and unless a manager assumes the management hostilely to an owner they do not help him to acquire adverse possession. [P. 101, C. 2.]

T. R. Ramachandra Iyer and *G. S. Ramachandra Iyer*—for Appellants.

S. Srinivasa Iyengar and *A. Krishnaswami Iyer*—for Respondent.

Wallis, Offg. C. J.—These are cross-appeals from the decrees of the Subordinate Judge of Madura in two suits, Original Suits Nos. 50 and 51 of 1906, in one of which the plaintiff, who styles himself the *matathipathi*, and is described by his opponents as the Gurukkal or priest of the Patharakudi *Mutt*, seeks to recover possession of two villages belonging to the *mutt* from the defendant in possession, while in the other, Original Suit No. 51 of 1906, he seeks for a declaration of his right to the possession and management of the *mutt* properties against the defendants, who are Nattukottai Chetties and deny the plaintiff's right to the management and enjoyment of the endowment. Their case is that the charity has been under the manage-

ment of their predecessors as hereditary trustees or *hukdars*, that the right of management from time immemorial had been in the Chetties, who had entrusted the actual management to eight families, who again left the routine management to the senior members of these families, who served in rotation two each year. The Subordinate Judge has held that the defendants have failed to show that the actual management was vested in these families as alleged in the plaint and has held that the plaintiff's predecessors were entitled to the management and enjoyment of the suit properties, but that the Chetti community have acquired by prescription a joint right of management with the plaintiff on trust for the objects of the charity and as to any surplus income on trust for the plaintiff. These findings are not in accordance with the case of either party and both have appealed against it.

While I am not prepared to say that a community, such as the Nattukottai Chetties, could not acquire such a right of joint management by prescription against the holders of the plaintiff's office, on a careful consideration of the evidence, I have come to the conclusion that they have failed to prove it, and that the plaintiff's appeal in this respect must be allowed and on the other hand the defendants' cross-appeal against the decree must be dismissed.

The Subordinate Judge has found on the documentary evidence that the suit villages were granted to the plaintiff's predecessors and were managed and enjoyed by them for a lengthy period subject to the trusts of the endowment, and there are no substantial grounds for questioning that finding. The accounts of the beginning of the last century, which have been produced in evidence and about the authenticity of which there is no question, show this conclusively. In these accounts there is no mention of the Chetties at all, except that in certain documents of 1809 the head of the *mutt* is styled Nagara Gurukkal. This apparently means Gurukkal of the Nagara Chetties. The Gurukkal of this *mutt* has apparently always been the Guru of the Chetties who may possibly have obtained this endowment for him, but this does not show that the suit villages were under their management. Among the documents filed for the plaintiff are registered *mazars*, Exhibit W, etc., executed at the request of the then holder to attest his title to and enjoyment of the suit villages on the ground that the title-deeds had been destroyed by fire. Exhibits P series show that the villages were classified in the Board of Revenue accounts as perpetual endowments granted to defray the charges of the Patharakudi Gurukkal. There is absolutely nothing to support the defendants' case until we come to Exhibits XXXIX and XXXIX (*a*) and XXXIX (*b*) of the year 1832. Exhibits XXXIX and XXXIX (*a*) are petitions addressed by the *zemindar* of Sivaganga, in whose *zemindari* the villages are situated, and by the Nattukottai Chetties respectively to the Collector of Madura, praying that certain officers who had been appointed apparently under Regulation VII of 1817 to inquire into the affairs of certain religious institutions and call for accounts should be withdrawn, as the endowments in question had been created for and were in the management of the Nattukottai Chetties who had been in the habit of paying the Government quit-rent on them. Among the institutions mentioned is the "Patharakudi *Matam*, which is the *gurustanam* of the said Chetties," that is, the seat of their religious teacher. A statement of this sort, made behind the back of the Guru with a view of inducing the public authorities to abstain from interference with the management of the endowment, is not entitled to any weight as evidence that the Chetties were exercising any right of management adverse to the Gurukkal. No doubt as stated in these documents and proved in evidence, they were supplementing the income derived from the endowments and coming to his assistance as their religious superior, but such action cannot properly be construed as adverse to him. Exhibits A and A1 are receipts for payments in connection with the institution and purport to be made on behalf of the Gurukkal. Nor is there anything in Exhibits D series, which are receipts for the *poruppu* or quit-rent payable by the institution, to suggest they were not made on behalf of the Gurukkal, though it may well be that, as stated in Exhibits XXXIX and XXXIX (a), it was the Chetties who paid the quit-rent.

We come next to the proceedings of the *Inam* Commissioner in 1864. The Gurukkal had died in 1863, and there was a vacancy in the office until 1867. In the *Inam* Register the Gurukkal is entered as the original grantee. The earlier accounts, which have been exhibited in this case, are among the documents referred to as evidence of this. The object of the institution is said to be the efficient maintenance of the *matam* presided over by the priest of the Nattukottai Chetties, including the feeding of *Brahmins*, worship of the Swami, and maintenance of the dignity of the priest or Guru. It is further stated that the Chetties who are very rich spend large sums on these objects. The priest had died fifteen months before, and the Chetties were contemplating electing a new one. ." It appears that when the priest was alive some of the principal Chetties, whose names are given in column 16, were managing the affairs of the *matam* and of the villages attached to it. The managers or trustees are elected by the Chetti community itself." This column 16 is headed "Particulars regarding present owner" and under the sub-heading "Name and age" eight Chetties are entered in the column as "Patharakudi *Matam* Trustees." The *inam* title-deeds were made out to the "Manager for the time being of the Patharakudi *Mutt*," and Exhibit R and Exhibits XXXII series show that they were handed over to the aforesaid Chetties. There was no Gurukkal at the time, and not much weight can be attached to the assertion of the Chetties made behind his back that they were entitled to the management, especially in view of the fact that the election of the trustees by the Chetti community as alleged by them has not been proved. It is not even alleged in the written statement, where the case set up is that the general management had been delegated to eight families the heads of which discharged it two a time in rotation. This the defendants have also failed to prove, and all that is shown is that the management has in recent times been left largely in the hands of individual Chetties who are not shown to have been appointed in any particular way.

In this state of the evidence I agree entirely with the finding of the Subordinate Judge that the defendants have failed to show that they had acquired the right of management when the present plaintiff, then a boy, was appointed as Gurukkal in 1867. The next question is, have they acquired it since. The vacancy in the office is alleged by the plaintiff to have been due to the fact that the last holder had failed to nominate a successor. Be this as it may, about 1867 the plaintiff, then a mere boy, was appointed to the office, though the authenticity of Exhibit XXX, the agreement with his father alleged by the Chetties, is not proved and it cannot be acted on. Certain Chetties as appears from the *inam* documents were in management during the vacancy, and having regard to the youth and inexperience of the plaintiff, it was only natural that they should continue in management after his appointment. Nor would there be anything unnatural if the plaintiff left the management in their hands when he grew older, considering the relations between them, as he was their religious priest and teacher and they accepted his ministrations and generously supported the institution. As already stated, the Subordinate Judge has found, and the evidence bears him out, that after the plaintiff's appointment the management was left very largely in the hands of individual Chetties, who are not shown to have been appointed in any particular way, but are treated by him as representing the Chetti caste as a whole, and he has come to the conclusion that through them the caste acquired by prescription against the plaintiff the right of managing the endowment, though as the plaintiff was not altogether excluded he finds that the right of management acquired by the caste was not exclusive of the plaintiff, and that the plaintiff is entitled to manage jointly with the caste. It is not easy to imagine what sort of joint management there could be by the Guru and the whole Chetti caste, but it is not necessary to go into this, as in my opinion the large part in the management taken by certain influential and energetic Chetties is not shown to have been adverse to the plaintiff. It is not enough to show that the plaintiff knew of the large part in the management taken by individual Chetties, it must be shown clearly that it was adverse to him; and this, in my opinion, should be very clearly made out where the relation between the parties was that of

religious teacher and adherents, and for some time after the plaintiff's succession the facts proved admit of the interpretation that they were acting as *de facto* guardians of the minor. In view of the intimate and confidential relations of the parties, the Courts, I think, should require adverse possession to the knowledge of the plaintiff to be very clearly made out, and I think that in this respect the defendants have failed to discharge the burden which lies upon them.

The Subordinate Judge has relied on the fact that the Chetties with the surplus funds of the endowments and funds raised by themselves erected a new *agraharm*, or set of residences for *Brahmins* and a new *matam* which he finds was intended for a lodging house for the Chetties. He also finds that the plaintiff concurred and acquiesced in what they did and took part in the opening ceremony of the new buildings. He also finds that the houses in the *agraharm* or *Brahmins'* quarters were let out to the kinsmen of the plaintiff at a nominal rent of 2 annas, and that they executed rent-deeds in favour of eight Chetties who are described as *hukdars* of the *mutt* and acting on its behalf. This is perhaps the strongest piece of evidence relied on for the plaintiff. It relates merely to buildings which had been erected at the cost of the Chetties and were let at a nominal rent to the plaintiff's relations. It is not perhaps surprising that the plaintiff should have refrained from raising any objection to the terms if he was acquainted with them, but it would be too much in my opinion to infer that he recognized their adverse rights of managing the whole institution. It is very significant that the defendants cannot show that, prior to the present litigation, *pattas* and *muchilikas* in respect of the village lands were exchanged between the *hukdars* and the *ryots*. That would indeed have been a very significant fact in support of their claim. It was, however, the conduct of the Chetties in getting such agreements from the *ryots* in 1890, Exhibits II and III, that led to the present litigation. The facts that the payment of *poruppu* and local cess was left to them and that notices in respect of these matters, styled *pattas* in the judgment, were sent to them by the Collector, Exhibits XXXV series and XXXVI series, only show that they took these liabilities on their own shoulders. The cadjan documents referred to in paragraph 34 of the Subordinate Judge's judgment are, as he points out in paragraph 33, open to considerable suspicion. Though they show that the general management and expenditure was left in the hands of the Chetties, they do not, as the Subordinate Judge points out, show that they ever exercised any control over the plaintiff's expenditure, or failed to honour his orders to pay. In these circumstances it is not easy to see how the acts can be considered adverse.

The Subordinate Judge has come to the conclusion that the acts of the Chetties must be considered to have been done on behalf of the caste as a whole and adversely to the plaintiff's right of exclusive management. The evidence appears to me to lend itself as readily to the view that the acts done by these individual Chetties were done on behalf of the plaintiff. The Subordinate Judge has not taken the view contended for by either side, but has come to the conclusion that the Chetties acquired a right of managing jointly with the plaintiff. I do not say such a right of joint management could not be acquired, but I should certainly expect evidence of incidents of joint management and it cannot be based upon the ground that, though the Chetties actually managed, there is no evidence that the plaintiff was excluded from the management. I find no evidence of such joint management or of the manner in which it was to be enjoyed. The Subordinate Judge relies on Exhibit XXXIII (*a*), a suit as to the ownership of certain lands in one of the suit villages, in which the Gurukkal was impleaded as the 8th defendant, but did not appear. Defendants Nos. 2, 4, 6 and 9 pleaded that the Gurukkal and certain other Chetties including the 9th defendant were trustees, and the 7th issue dealt with this, but the judgment as to this issue merely says: "There is some evidence that the 9th defendant and a few others looked after the affairs of the *matam.*" An unproved allegation made by the 9th and other defendants in a suit in which the Gurukkal did not enter appearance is, in my opinion, quite worthless as evidence of joint management, though some evidence that the management of the Chetties was not adverse to him. I think the choice is

between holding that plaintiff never lost his right of management and holding that the caste acquired it. As I have already said, having regard to the nature of the relation existing between the plaintiff and the caste, I am not prepared to make any presumption in favour of the defendants, but think that they should prove their case clearly and that it is not open to them to make out their title by relying on acts of an ambiguous nature. The Chetties cannot be allowed to press their assistance on their religious head and then on the strength of that assistance turn round and say they have ousted him from the management of his institution by adverse possession. The weakness of the case as to the Chetties' management appears further from the finding of the Subordinate Judge that, though the caste is entitled to joint management with the plaintiff, they are only entitled to manage in trust for the plaintiff, whom he finds to be the sole beneficiary during his life-time of the entire income of the villages subject only to the maintenance of the institution, *i. e.*, "maintenance of *poojah* and of himself according to his dignity and the feeding of *Brahmins* as appurtenant to the institution according to the usage and scale of the institution" (paragraph 66). The fact thus found by the Subordinate Judge makes it exceedingly unlikely that the Chetties should have acquired a mere right of management for the benefit of the plaintiff. What they claimed was full control over the endowment and its funds. Both parties have appealed from the judgment in each suit. The appeals by the Chetties, Appeals Nos. 31 and 33 of 1909, are dismissed with costs. The plaintiff's appeals, Appeals Nos. 65 and 66 of 1909, are allowed with costs throughout and the decree in Original Suit No. 51 of 1906 will be modified by declaring that the plaintiff is solely entitled to possession. In Original Suit No. 50 of 1906 the plaintiff is entitled to a decree for possession. As to mesne profits I concur with the judgment of my learned brother.

Kumaraswami Sastri, J.—These appeals relate to the villages attached to the Patharakudi *Mutt* in the Madura District. The appellant, Venkatachalapathy Guruswamigal, filed Original Suit No. 51 of 1906 for a declaration that he as the head of the *mutt* was entitled to the possession of the village of Patharakudi and to receive the income from the Receiver, and Originai Suit No. 50 of 1906 for a declaration of his right and for possession of the villages of Varivayal with its hamlets and Nagavayal and mesne profits. The plaintiff's case is that he is the head of the Patharakudi *Mutt*, that the villages in question were granted to the then head of the *mutt* by the Pandiyan Kings in the 16th century, that the defendants were managing the properties with his permission, that, as they were trying to assert exclusive title, he terminated their power of management, that, in consequence of disputes between the parties, the village of Patharakudi was ordered to be attached by the Head Assistant Magistrate of Ramnad until the rights of the parties were adjudged in a Civil Court, that the lease of Varivayal and its hamlets and Nagavayal by the Chetties in favour of the defendants in Original Suit No. 50 of 1906 is not valid and was not authorised by him and that he is consequently entitled to the possession of the villages. The defendants deny that there was any such *mutt* known as the Patharakudi *Mutt*, of which the plaintiff was the head, and state that the Chetti community founded the charity at Patharakudi, the objects of which were to provide for the worship of the God Palampathy Nathar, the maintenance of the priest and the feeding of poor *Brahmins*, and that the plaintiff was only a person appointed by them to minister to their spiritual wants, that he was receiving an allowance from the Chetti community and that, beyond receiving the allowance, he had no rights to the properties. The defendants claim to be the trustees of the plaint charity and entitled to possession as such trustees. The Subordinate Judge held that the plaintiff was the head of the Patharakudi *Mutt*, that the villages claimed were part of the endowments of the *mutt*, that some of the Chetties, as representing the Chetti community, assumed possession and management of the villages and were managing the properties and utilising the income for purposes of the *mutt* and the maintenance of the plaintiff and that the plaintiff acquiesced in the management of the Chetties from the time they assumed the management. He was further of opinion that the management of the

Chetties was not in pursuance of any adverse right, that the defendants had no right as managers or trustees in their own right, either by virtue of the original constitution or of any special custom or valid scheme for management, to the possession of the property and to the enjoyment of the income and that the plaintiff was neither a servant nor an officer under their orders. He held that the Chetti community as a whole had the right of management and was entitled to the possession of the villages and to administer them as such managers and that the plaintiff's right was only to the surplus income as the sole beneficiary and to an account of the income of the properties from the Chetties. In the result he passed a decree declaring that the plaintiff, as Gurukkal and head of the Patharakudi *Mutt*, was entitled to joint trusteeship and management with the Yelayathakudi Nagara Chetties, that he was entitled as Gurukkal to the entire beneficial enjoyment of the income during his life-time and continuance in office as such and that he was not entitled to sole possession as claimed by him. Both parties appeal against the decree, the plaintiff contending that he ought to have been granted a decree for possession and the defendants contending that the plaintiff was a mere servant of the Chetties and was not entitled to any of the declarations made by the Subordinate Judge.

The main questions arising for determination in these appeals are :

(1) Whether there was an institution called Patharakudi *Mutt* to which the villages claimed in the plaint by the plaintiff were granted as endowments ;

(2) Whether the plaintiff is the head of the *mutt* or is a mere servant of the defendants ; and

(3) Whether the defendants have acquired any and what interest in the management of the trust, assuming that the first two points are found in the plaintiff's favour.

The case for the plaintiff is that the *mutt* was endowed by Soundara Pandyan Raja, one of the Pandyan Kings, who ruled in the 16th century and who granted the villages of Patharakudi, Nagavayal, Varivayal and Kulamangalam for the support of the *mutt*. There can be little doubt from the documentary evidence that such a grant was made. Exhibit W, dated 5th August 1809, is a *mahzarnamah* by Subramania Gurukkal, the then head of the *mutt*, to the elderly persons of the village. It recites that Patharakudi Village was in the enjoyment of the Gurukkal and his ancestors for a long time, that the documents were destroyed by fire and that he desired to have an entry made in the register to that effect. It requests the elders to bear witness to the truth of these allegations and it is attested by certain elders in token of its truth. Exhibits W1, W2 and W3 are similar applications in respect of other villages attached to the *mutt* and they were registered by proper authorities. On 31st December 1814, it appears from Exhibits P, P1, P2 and P3, which are extracts from the register of *maniams* forwarded to the Board of Revenue on the 3rd January 1815, that the villages were classified as perpetual endowments granted to defray the charges of Patharakudi Gurukkal. Exhibit K, which is an extract from the *istimrari* account showing the income for the year 1801-1802, refers to the *Brahmin* feeding of the Patharakudi *Mutt* and the villages of Patharakudi and Nagavayal. Exhibit L which is dated 4th November 1814, refers to the "Patharakudi Tiruppunavasal Mudanmayar, Madapuram Athinam" (Tiruppunavasal Mudanmayar being admittedly the title assumed by the Gurukkals). Exhibit M, which is an account produced from the records of the Collector of Madura for the year 1803-04, refers to the "Patharakudi Gurukkal's village" and Exhibit N, which is an extract from an account in the Collector's record refers to the village which is described as "Madappiram Patharakudi" and gives the boundaries of the village. Exhibit O is an extract from the *istimrar* cadjan account in the Collector's office for the year 1800-01 (but wrongly printed as 1860-61 in the record). It refers to *maniams* and *swathanthrams* in the villages attached to the Sivaganga *Zemindari* and among the *maniams* are mentioned (1) "Tiruppunavasal Mundanmayar" *Manyam*. In 1863 the *Inam* Commissioner held an enquiry and Exhibits XXXI and XXXI (*a*) are extracts from the *inam* register. In dealing with the villages of Patharakudi, Nagavayal, Variyanendal Surakudi, etc.,

attached to the *mutt*, the description of the *inam* is given as "granted for the support of the *matam* in Patharakudi village." It also describes the grant as 'permanent' and as having been made by Soundara Pandyan Raja. Exhibits O and BB are referred to as documents showing the nature of the grant and the name of the original grantee is given as "Patharakudi *Matam* Subramania Gurukkal." The history of the *matam* is given and in dealing with the object of the grant the extract states as follows:—"It appears by the tradition that the object of the grant is to keep the *matam*, which is presided by the Priest of Yelayathakudi Nattukottai Chetties, efficiently by feeding *Brahmins* in a *chathran* situated close to the *matam*, by worshipping the Swami in Palampathi Nathar Koil situated close to the *matam* and by maintaining the dignity of the priest or *guru*." It refers to the affairs of the *matam* being managed by some Chetties and gives the names of eight managers or trustees who were looking after its affairs at the time. At the time of the enquiry, there was no head of the *mutt* as the previous Gurukkal had died about 16 months before and nobody had been appointed in his place. There can be little doubt from Exhibit XXXI that the institution, to which the charities were attached, was a *mutt* presided over by a *matathipathi*. Exhibit R is the *inam* title-deed, dated 3rd June 1864, and it is granted to the manager for the time being of the Patharakudi *Matam*. Exhibits B, B1 and C, C1 are extracts from the register showing the result of the enquiries made in respect of *maniams* in the Sivaganga *Zemindari*, Madura District, for *Fasli* 1223, and filed before the *Inam* Deputy Collector. They refer to the *maniams* as having been in the enjoyment of the Gurukkals and to Thiruppunavasal Mudanmayar Nagari Subramania Gurukkal as being in possession at that date. The *inam* is described as having been given to the *Madapuram* or *mutt* and Subramania Gurukkal is said to be in the enjoyment of the villages paying *poruppu* to the *zemindar*.

Both the plaintiff and defendants admit that the villages were granted by the Pandiyan Kings. The case of the plaintiff is that it was granted to the head of the *mutt* for the purpose of the upkeep of the *mutt*, while the case for the defendants is that it was really granted to the Chetties of Yelayathakudi but that the grant was in the name of the spiritual head owing to the fact that grants were not made to *Sudras*. There is nothing to show that the grant was made to anybody except the Gurukkal and the documents referred to above make it clear that it was always treated as a grant to the Gurukkal and his successors in office and not to the Nattukottai Chetties. So far as at least Southern India is concerned, grants have been made by kings to *Sudras* [*vide* the history of *mutts* given in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (1)] and there is no reason why the grant should not have been made to the Chetties if, as a matter of fact, they were the persons to whom the Pandiyan King wanted to give the property. The contention that the grant was really to the Chetties and not to the head of the *mutt* does not seem to have been made at any time before the suit, but, on the contrary, the documents I have referred to and the *Inam* Commissioner's Report referred to above show that the Chetties in 1863 admitted that the grant was to Subramania Gurukkal and that the original grantee was Subramania Gurukkal. If the grant was really to the Chetties they would certainly have said so. There can be little doubt on this part of the case that the Patharakudi *mutt* is an institution existing from the 16th century and that the grant of the lands now claimed was to the then head of the *mutt* and his successors. In Exhibits P, P1 and P2 under the heading "Hereditary or during the natural life of the incumbant" the statement is made that it was a perpetual endowment, and in Exhibit R, the *inam* title-deed, the grant is made to the person in management of the Patharakudi *mutt* and his successors. Exhibits BBI and CCI also refer to the grant as hereditary and, so far as the records go, the grant has always been treated as a grant to the Gurukkal and his successors. I have no hesitation in holding that the decision of the Subordinate Judge, to the effect that the plaint mentioned institution was an ancient religious *mutt* presided over by a *Brahmin* who was also the

(1) (1884) 10 Mad. 375.

spiritual head of the Chetties and that it was not merely a trust founded by the Chetties (the Gurukkal being only their servant with no interest in the *mutt* properties), is correct. The grant was a grant to the Gurukkal for the time being and vested in him and his successors the ownership of the properties, subject, of course, to the performance of the trusts which as head of the *mutt* they had to perform. From the 16th century there is no reference in any of the documents to the grant having been made to the Chetties or to their having any rights of ownership in the villages granted.

The head of the *mutt* has, therefore, *prima facie* the right to possession unless it can be shown that he has either parted with his rights or that adverse rights have been acquired by third parties.

Turning to the question of the position of the plaintiff, I see no reason to differ from the Subordinate Judge that he is the present head of the Patharakudi *Mutt*. The contention of the defendants that he is a mere servant removable at pleasure is unsupported by any documentary evidence, and no instance has been cited where the head of the *mutt* has been removed by the Chetties. The idea of treating their spiritul preceptor as a paid servant is so repugnant to the ideas, customs and manners of the Hindus that it would require very strong evidence before the contention of the defendants can be accepted. The series of documents, which I have referred to above, treat the Gurukkal as the head of the *mutt* and the property as descending to his successors. There can be little doubt that the head of the *mutt* for the time being was also the spiritual preceptor of the Nattukottai Chetties and very probably the importance of the *mutt* was due to the fact that its head was a *guru* of a rich and influential section of the Hindu community who liberally aided the *mutt* with funds. As regards the appointment of the head of the *mutt*, plaintiff's case is that the heads of *mutt* are appointed by the preceding head and in the absence of such an appointment by the *Brahmin* inhabitants of the Patharakudi Village, who belong to the *Veelia* sub-division of *Brahmins*. The defendants state that the whole body of the Yelayathakudi Nattukottai Chetties have been appointing unmarried men as Gurukkals or priests. It is clear from the documents, which I have already referred to, that the person, who, for the time being, occupied the position of Patharakudi Gurukkal, was treated as the person to whom the *inams* were granted. The evidence as to how the Gurukkal was appointed is not very clear. The usual practice in *mutts* is for the *matathipathy* or the head of the *mutt* for the time being to appoint his successor and there is no reason to suppose that in this *mutt* this practice was departed from. The difficulty, however, arises where the head of the *mutt* died without naming his successor. The plaintiff states that it was the *Brahmin* inhabitants of Patharakudi that had appointed him, while the Chetties state that he was appointed by them. The facts that the seven immediate predecessors of the plaintiff were members of the family of the plaintiff residing at Patharakudi and that Exhibits BB1 and CC1 refer to the members of the family of the *guru*, and that annual payments from the *mutt* are made to the *Veelia Brahmin* families at Patharakudi, lend strong force to the contention that the selection of the *guru* was not at the will and pleasure of the Chetties but that the *Veelia Brahmin* inhabitants of Patharkudi had a voice in the selection. The probabilities are that the appointment was made by both of them in co-operation, the *Brahmins* selecting a suitable person and the Chetty community or its most influential men approving of the choice and requesting the *Brahmins* to do the needful in the matter of preparing the selected candidate for the office. It is, however, unnecessary to discuss the point in detail, as in the present case it is not disputed that the plaintiff is the Patharakudi Gurukkal for the time being, whether he was appointed by the Chetties or whether he was appointed by the *mahajanas* of the Patharakudi Village. The evidence in the case shows beyond dispute that the plaintiff was appointed Gurukkal on the 25th *Chitrai Prabhava* (6th May 1867). It is not suggested that from that date up to the date of suit any other person was the *guru* of the *mutt* or was receiving the emoluments appertaining to the office. If there was any defect in the appointment of the plaintiff, that has been made good by his enjoyment of the office from 1857.

The real dispute in the case is not so much as to the plaintiff's right to the office, but to the right of the Gurukkal for the time being to the possession and enjoyment of the properties of the *mutt*. The extreme contention of the defendants that the plaintiff was their mere servant has been very properly rejected by the Subordinate Judge. There is no evidence worth the name to show that at the time of his appointment there was any curtailment of his rights and privileges as head of the *mutt*, nor is there any reason to suppose that the plaintiff's position was in any way different from that of his predecessors. I have no hesitation in agreeing with the Subordinate Judge that Exhibit XXX is a document whose genuineness is open to great doubt and that it cannot be acted upon. It is proved by the evidence that the institution referred to in the plaint was a *mutt* with a head or *matathipathi*, that the villages claimed in the plaint were granted to the head of the *mutt* for the time being and vested in his successors and that the plaintiff is the present head of the *mutt*. The Subordinate Judge, having found these facts in favour of the plaintiff, was of opinion that he had lost the right to the sole management and possession, because some Chetties were in management in their own right before the plaintiff's appointment and continued to be so afterwards and that consequently the plaintiff has lost the exclusive title to the management of the properties. In dealing with the question of adverse possession, it has to be borne in mind that the plaintiff and his predecessors-in-title were the *gurus* or the spiritual preceptors of the Chetties and that, so far as appears from the record, the relations between them were harmonious till five or six years before the suit. In 1901, the Chetties filed Original Suit No. 59 of 1910 against certain tenants, alleging that the plaintiffs were trustees and in enjoyment of the lands by letting out the same to tenants. The defendants pleaded that the properties belonged to the Gurukkal and not to the plaintiffs and the plaintiffs withdrew the suit. Instead of filing a suit the Chetties instituted criminal proceedings against the Gurukkal, which were dismissed. They then took proceedings under Chapter XII of the Criminal Procedure Code, the upshot of which was that the Gurukkal was declared to be in possession of the *mutt* and the Chetties were enjoined not to disturb his possession. As regards the villages, Patharakudi was put in the possession of the Receiver, and the Gurukkal was ordered not to interfere with the possession of the lessees of the other villages. The Chetties did not file any suit to establish their title to the *mutt* but, on the other hand, the Gurukkal filed these suits to establish his title. There is very little evidence to show that the Chetties at any time asserted a title adverse to the *guru* and there is no evidence on record to show that the head of the *mutt* for the time being was treated as a servant of the Chetties removable at pleasure. The Chetty community (consisting, as it did, of rich and influential persons) was interested in the affairs of the *mutt* and there is nothing improbable in the plaintiff having allowed them to continue to manage the immoveable properties of the *mutt*, as they were managing the properties during the period between the death of the preceding *guru* and the plaintiff, who succeeded him as a young man (about 18 years old). There is no reason in the present case to presume that the management of the Chetties was adverse to that of the *guru*.

There can be little doubt that some Chetti disciples were managing the properties of the *mutt* in 1864, the date of the *inam* statement, Exhibit XXXI. There is nothing to show that from the 16th century, the date of the grant of the villages, up to 1832 the Chetties were in possession or management of the properties of the *mutt*. The first document in which any reference is made to trustees is Exhibit XXXI, which came into existence at a time when there was no *matathipathi* and the Chetties were in possession. The earliest document, which shows that the Chetties were interesting themselves in the temple properties, is Exhibit XXXIX, dated 30th April 1832. In that year there seems to have been some interference with temple affairs by the Government Officials who demanded accounts and the *zemindar* of Sivaganga, in whose *zemindari* the *mutt* and the villages were situate, sent Exhibit XXXIX to the Collector. It refers to several temples, etc., and recites that Patharakudi *Mutt* was a Gurusthanam of Yelayathakudi Chetties who settled in the *zemindari*,

that the Chetties had the management of the temple, matam, etc., and paid moneys for the expenses of the *pooja* and prayed for orders that the *maniyams* and others newly appointed by the *amildar* may be recalled. The Chetties of Yelayathakudi town sent a similar petition, Exhibit XXXIX (*a*), and the Collector passed an order directing that the villages mentioned in the order belonging to the Nagara Chetties should be left in their possession only, without *Maniyams* and others being appointed thereto, and that only *poruppu* should be collected. Among the properties is mentioned "Patharakudi *Matam* which is said to be the Gurusthanam of the Chetties." There is no reference in these exhibits to a Gurukkal then being alive and it is difficult to determine at such a distance of time if the Chetties acted without reference to the then Gurukkal, if there was one, and took the rather unusual course of asserting their independance and title. It is quite possible that as in 1864, there was then no head of the *mutt* in existence, or, if there was one, he did not interfere and left it to the general body of worshippers or disciples to move in the matter. We find from Exhibit DD, dated the 25th August 1840, (wrongly printed as 1900) that in 1840 the head of the *mutt* was managing the *mutt* properties and taking agreements in his name and the absence of any document between 1832 and 1863 showing that the Chetties exercised any acts of interference over the *mutt* properties is significant. I agree with the Subordinate Judge in holding that those documents do not show that the Chetties were trustees or managers of the institution. The next documents, in which the names of the Chetties appear, are the *inam* statements, Exhibits XXXI and XXXI (*a*). It is admitted that, at the time of these statements, the Gurukkal for the time being was dead about 15 months before the *inam* statements were given, that no *guru* was appointed at the time of these statements and that the plaintiff's appointment was four or five years afterwards. Under these circumstances it is difficult to see how these statements, which are presumably made by the Chetties, can be taken as conclusive against the head of the *mutt* where the statements are against the interests of the *mutt*. The statements made by the Chetties, however, show that their management cannot be said to be hostile to the head of the *mutt*. It is alleged that the object of the grant was "to keep the *matam*, which is presided by the priest of Yelayathakudi Nattukottai Chetties, efficiently, by feeding *Brahmins* in a *chathram* situated close to the *matam*, by worshipping the Swami in Palampathi Nadhar Koil situated close to the *matam* and to maintain the dignity of the priest or guru." It recites that the priest of the *matam* died 15 months before and that the Chetties are contemplating the election of a new priest and goes on to state that, when the priest was alive, some of the principal Chetties, whose names are given in column 16, were managing the affairs of the *matam* and of the villages attached to it and that the managers or trustees are elected by the Chetti community. It then goes on to state that the grant was an hereditary grant, that it was in uninterrupted possession of its holders since the date of the grant and that the persons mentioned in it were then the trustees and were managing its affairs. Under the heading "Name of original grantee" the name of Patharakudi Subramania Gurukkal is mentioned. The plaintiff, who was appointed a few years subsequently, was a young man of about 18 or 19 years of age and the management of the properties continued to be in the hands of the Chetties. There is, however, no evidence that the Chetties assumed a position of hostility to the plaintiff, till 1901. On the contrary, we find that in Exhibit Q1, an account, dated 11th November 1899 submitted for *Fasli* 1309, of the income of the villages, Madathipathi Venkatachala Gurukkal, *i.e.*, the plaintiff is mentioned in the column describing the villages presumably as the person entitled to the villages.

The case for the defendants, as set out in their written statements, is that the whole body of Chetties had been exclusively managing the villages, that, owing to difficulty and inconvenience of the whole body of Chetties taking part in the management, eight families, representing eight of the nine broad divisions into which the Chetti community is divided, were entrusted with the management, that it has been the immemorial custom for the senior members, for the time being, of the eight families to undertake the manage-

ment of routine matters by rotation two for each year, except in matters calling for the co-operation and conjoint action of all the trustees and that the trustees were managing in their own rights as representatives of the community. The Subordinate Judge finds that the evidence on record does not bear out the defendants' case of a trusteeship being vested in eight families nor does it show any scheme or rules for the management of the institution by the Chetties. This finding of the Subordinate Judge is amply borne out by the evidence. Not only is there no reference to any trustee in documents prior to [Exhibit XXXI (*a*)] 1864, but there is no proof of any election of trustees to fill up vacancies that occurred since. The Subordinate Judge, however, is of opinion that some Chetties, as the representatives of the Nagara Chetties, interested in the institution as its disciples, assumed possession of its endowments when the plaintiff's predecessor died, put forward to the *Inam* Deputy Collector their claims as their *hukdars* and trustees elected and chosen by the Nagarathars to their possession and management of the same and were so recognised, that two or more amongst them continued to be the managers and *hukdars* on the strength of such claims without reference to the plaintiff's orders or requests to them to manage, collected the produce and the income of the institution, distributed and appropriated them for the maintenance of the *mutt* and of the plaintiff and that the plaintiff acquiesced in the management of the Chetties from the moment he assumed the headship of the *mutt*, never questioned their claims but received from the Chetties whatever was required. He also finds that the evidence does not show that the right of the person who was the head of the *mutt* before 1863 was curtailed or limited by any agreement between the plaintiff and the Chetties and that the plaintiff was not excluded from the management. He also held that it was not shown that the Chetties who were managing the endowments from 1863 professed to exercise any right adverse to the rights and privileges of the plaintiff as the head of the *mutt*. He was, however, of opinion that the fact that the Chetties were in management without any permission from the plaintiff but in the professed rights of trustees, amounted to a discontinuance of the plaintiff's exclusive possession within the meaning of Article 142 of the Limitation Act and that the plaintiff, who would have been the sole manager, became only entitled to joint management with the Chetties. He consequently passed a decree declaring that the plaintiff as the Gurukkal and head of the Patharakudi institution was a trustee and manager of the same conjointly with the Yelayathakudi Nagara Chetties. The Subordinate Judge in his judgment (paragraph 60) finds that the plaintiff has been living in a portion of the *mutt*, and has been in receipt of the income for his maintenance, *pooja* and other expenses, that he was recognised by the Chetties as one of the trustees in 1880 and as *matathipathi* (or head of the *mutt*) in 1899 and that all this was not due to the permission of the Chetties but to his own right as *guru* or head of the institution. He also finds that the plaintiff "was not excluded from such management, though he did not in fact interfere with the Chetties' management and did not express his wish to have a hand in it." He thinks that these facts would not prevent the acquisition of prescriptive title by the Chetties to manage. I find it difficult to follow the Subordinate Judge in his reasoning that the whole body of the Yelayathakudi Chetties acquired by adverse possession the right to the joint management with the plaintiff. The evidence shows that the *mutt* is of the usual type, such as the Udipi and Dharmapuram *Mutts* in Southern India, presided over by the head or *matathipathi* or Gurukkal who was entitled to the endowed properties, that the villages in question belonged to the *mutt* and vested in the plaintiff and that, till disputes arose before the suit, the properties were always treated as the properties of the *mutt*. From the 16th century up to 1864, the date of the *inam* enquiry, we find no reference anywhere to any trustees, and the evidence after 1863 does not show that there was any legally constituted body of trustees. It is argued by Mr. Srinivasa Aiyangar that it should be presumed from the fact that the trustees are mentioned in Exhibit XXXI that the original constitution of the *mutt* provided for trustees and that, according to the rules of the *mutt*, the management was never in the hands of the Gurukkal but in those of the trustees. This view is

inconsistent with the earlier documents which, the Subordinate Judge has rightly observed, "show that the Gurukkals have been the owners, managers and holders of the endowments from the time the institution came into existence and the endowments were granted." There is nothing in the evidence to show that, according to the usage of the *mutt*, the Gurukkal was merely a figurehead only entitled to receive such sums as the Chetties chose to give him and with no rights either of ownership, management or control. The right of the plaintiff to the possession and management, which is an incident of the right of ownership, can only be defeated by the defendants showing that either they or anybody else acquired any title by adverse possession.

It cannot be disputed that the Chetties, who were in management, though calling themselves *hukdars* or trustees, professed to manage the properties for the benefit of the *mutt*, which is in this case represented by the plaintiff as the Gurukkal. This is not a case where the property belongs to an idol with a trustee or *dharmakartha* but a case where the property vests in the *guru* himself who is the sole beneficiary. The fact that he is bound to apply the income for certain purposes would not affect the question. It has, no doubt, been held that, where property is dedicated to an idol, the office of *darmakartha* may be acquired by adverse possession, but where property is given to the head of a *mutt* and vests in him absolutely subject to the application of the income to certain purposes, the person who manages the property on behalf of the *mutt*, *prima facie* manages it also on behalf of the Gurukkal, who is the sole person entitled to the properties. Even assuming that the Chetti community as a whole were managing the properties for the *mutt*, their management was only a management on behalf of the plaintiff and *prima facie* the plaintiff has a right to put an end to their management if he chooses to do so. Mere length of time of management on behalf of another would not deprive the owner of the property of his power to put an end to the management and assuming the same himself. In the present case we have to see whether the evidence is such as to support the view that the entire body of the Chetti community acquired as against the plaintiff a right to hold the property in spite of his desire to be in possession. I have already pointed out that the relation between the parties was that of priest and disciples. The plaintiff was a young man who, when he assumed the office, found that the properties were already in the management of the Chetties who had managed the properties between the death of his predecessor-in-office and his appointment. There is nothing improbable in the fact that, being young and inexperienced, he allowed the Chetties to continue to manage the properties and did not take an active part in the management. All that the Subordinate Judge finds is that, in dealing with the income from the properties; the Chetties acted as they chose without consulting the plaintiff. There is nothing on record to show that the plaintiff ever objected to the items of expenditure incurred by the Chetties and that, in spite of his objection, expenses were being incurred. There is, therefore, no reason for supposing that any act of management was done against the wishes of the plaintiff.

Great reliance has been placed by the appellants' Vakil on the fact that the accounts show that the Chetties had been collecting the income and making disbursements, and that they were paying the plaintiff whatever they chose and spent the balance at their pleasure. I am not disposed to base complete reliance on the cadjan account produced by the Chetties, as it is clear from Exhibits G and G1 that accounts were being fabricated and written up for the purpose of supporting the claim of the Chetties. It is proved that Exhibits G and G1 were written by Annamalai Chetti, who, the Subordinate Judge says, was admittedly the agent of the defendants, to Ganapathi Aiyar who, the plaintiff deposes, was the person sitting in Court and instructing the defendants' Vakil. No attempt was made by the defendants to show that Exhibits G and G1 are not genuine nor was any objection taken as to their admissibility in evidence. Ganapathi Aiyar, who was in Court, did not choose to deny the genuineness or deny that he received it. The account books, therefore, must be received and considered with caution and implicit reliance cannot be placed on them. The accounts, such as they are, do not show any adverse management; on the contrary, it appears that the fees and emolu-

ments, which were admittedly the sole and absolute property of the plaintiff, were brought into account and that one account was kept of the income of the *mutt* and the fees and emoluments of the plaintiff. The utmost that can be said is that the Chetties kept the income in their own hands and met the expenditure of the *mutt* in the manner they thought proper, but there is nothing to show that anything was done against the wishes of the head of the *mutt*. All that can be said is that the plaintiff left it to some Chetties (who were shrewd men of business) to do what they pleased so long as he was being paid what he wanted. The mere fact that like many persons of his class the plaintiff chose to lead a life of indolence without troubling himself about the management of the *mutt* properties, which he found in capable hands at the time he succeeded to the office, will not prevent him from resuming management, though he might be bound by the acts of the Chetties during the period of their management. Great reliance has also been placed by Mr. Srinivasa Aiyangar on the fact that the new *agraharam* and *matam* were built by the Chetties at great cost, this showing that the Chetties did what they liked with the surplus. In the first place, there is nothing to show that the Gurukkal was opposed to the building of the *mutt* and the *agraharam*. On the contrary, we find that he took part in the *grahapravesam* ceremony and was residing in the newly built *mutt*. I find it difficult to see how it can be said that this fact should be taken against the plaintiff to prove that the management of the Chetties was hostile. Though some reliance seems to have been placed in the lower Court on Exhibit V, the Subordinate Judge was not disposed to place much reliance on it and the appellants' Vakil did not contend that Exhibit V estops the plaintiff or was of much value. Documents have been filed to show that the Chetties leased the properties and exercised other acts of management. As pointed out by the Subordinate Judge, the fact that some Chetties called themselves trustees of the *matam* at a time when they were admittedly managing during an interregnum, would not prove that there were any trustees during the life-time of the previous Gurukkal. The word 'trustees' seems to have been used in a loose sense, as Exhibit XXXI (the *Inam* Register) refers to some of the principal Chetties *managing* the affairs of the *mutt* during the time of the late priest and speaks of "managers or trustees." Exhibits S1 and S2 (*inam* statements) speak of "*vicharanai hukdar*," that is, a person entitled to manage, which certainly is not equivalent to the word owner. Exhibits I series refer to the Chetties as *hukdars*, but the word cannot be used in the sense of their being owners, as it is followed by words of showing that they were acting on behalf of the *mutt*. The word must be taken to mean as *vicharanai hukdars*, or persons who were rightfully managing the properties. The *pattas*, Exhibits XXXV (*c*) and XXXV (*d*), refer to Nachiappa Chetti as *vicharanaidar* or manager. No agreements prior to 1900 are filed where the Chetties call themselves *hukdars*, and too much weight cannot be attached to the documents as disputes began in 1901. The acts of management referred to by the defendants such as leasing properties, paying taxes, etc., are only incidental to the management of the properties and, unless they assume the management hostilely to the plaintiff, I do not think these documents will advance their case very far. They are consistent with the view that they managed the properties on behalf of the plaintiff and where a legal origin can be inferred to their possession and management, I see no reason to presume that they acted adversely to the *guru*. I find it difficult to come to the conclusion that the whole body of the Chetties assumed hostile management of the *mutt* and prescribed it for the possession of the trustees of the *mutt* and thus acquired the right of management. Even assuming that the whole community, scattered over India, Burma and the Strait Settlements, can acquire the rights by adverse possession, which is a question not free from doubt, I am of opinion that in the present case the evidence adduced on behalf of the defendants falls short of it. They started their case by setting up a specific usage, whereby the trustees were elected by the community and whereby vacancies in the office of trustees were filled by the community. This case has been rightly found against them by the Subordinate Judge and it is difficult to see how the present defendants can claim any right

to the properties as trustees. No doubt as defendants they are entitled to show that the plaintiff has lost his right, but in the present case I do not think that they have succeeded in showing that the whole community of Chetties acquired by adverse possession the right to manage the *mutt* properties and to remain in possession of the same.

It follows that the plaintiff is entitled to a declaration that he, as the head of the Patharakudi *Mutt*, is entitled to the possession of the properties with which the *mutt* was endowed. So far as Appeals Nos. 31 and 66 of 1909 are concerned I am of opinion that the plaintiff is entitled to the declaration prayed for. Appeal No. 31 will be dismissed with costs and Appeal No. 66 allowed with costs throughout.

As regards Appeals Nos. 33 and 65 of 1909, the Subordinate Judge finds that the leases set up by the defendant are invalid for want of registration, that, even if they were valid, the terms have expired and that the defendant has no claim under any subsisting lease and is now in possession as a tenant holding over after the expiry of the lease. The plaintiff is, therefore, entitled to possession. As regards mesne profits the Subordinate Judge states that the plaintiff's Vakil conceded that the amount may be taken as the rent admitted by the defendant for the villages of Varivayal and Nagavayal. The defendant in Original Suit No. 50 of 1906, who was examined as defendant's 4th witness, admits that the rent payable by him under the last lease was Rs. 2,660 a year. He states that he paid rent for *Fasli* 1314 and that Exhibit VIII, dated 14th May 1906, is the *hundi*. The plaintiff allowed the Chetties to manage the property and did not take an active interest in the management. Having regard to the peculiar circumstances of the case I do not think that the plaintiff is entitled to question payments made by the defendant to the Chetties before suit, especially as they undoubtedly borrowed moneys for the building of the *matam* and *agraharam* and had to recoup themselves. It will, of course, be open to the plaintiff to call for an account from the defendants in Original Suit No. 51 of 1906. I am of opinion that the plaintiff is entitled to mesne profits from *Fasli* 1315 till date of delivery of possession at Rs. 2,660 a year. Appeal No. 33 will be dismissed with costs and Appeal No. 65 allowed with costs and it will be declared that the plaintiff, as the head of the *mutt*, is entitled to the properties claimed and that the defendant do put the plaintiff in possession of the properties and pay mesne profits at Rs. 2,660 from *Fasli* 1315 till date of delivery of possession. The appellant in Appeals Nos. 65 and 66 will be entitled to his costs in this and the lower Court.

Appeals Nos. 31 *&* 33 *dismissed*; *Appeals Nos.* 65 *&* 66 *allowed*; *Decrees modified.*

S. N./R. K.

A. I. R. 1916 Madras 102

AYLING AND TYABJI, JJ.

Bangaru Muthu Venkatappa Nayanivaru—Defendant—Appellant.

v,

Golla Chinnabba Naidu—*Plaintiff* and *others*—Defendants—Respondents.

First Appeal No. 136 of 1910, decided on 17th March 1915, against the decree of Dist., Judge, North Arcot, dated 20th December 1909, in O. S. No. 35 of 1908.

(a) Transfer of Property Act (4 of 1882), Ss. 55 and 58—Mortgagee of grant of *Dasa bandham* dues can enforce it against purchaser with notice from grantor.

A *zemindar* made a grant for the benefit of the ladies of his family of the *dasabandham* dues recoverable by him from certain villages and himself undertook to collect the same and pay them on to the ladies. The grantees mortgaged these rights to another person:

Held, that the mortgagee could enforce his rights under the mortgage against the subsequent purchaser of the *zemindar's* right with notice of the obligation. [P. 110, C. 2.]

(b) Grant—Construction—Words "son to grandson" in grant of *dasabandham* dues are words of limitation and not of purchase.

Per *Tyabji, J.*—The words "son to grandson" used in a grant of *dasabandham* for benefit of family ladies are merely words of limitation and not of purchase. [P. 107, C. 1.]

(c) Custom—Validity—Custom of grant by *zemindar* to ladies of the family of the maintenance of *dasabandham* dues prescribing course of devolution and management is valid.

A custom providing for grant by a *zemindar* for the maintenance of the ladies of his family of the *dasabandham* dues recoverable by him from certain villages and prescribing a particular course of devolution and management of such property, is neither uncertain nor opposed to public policy, and is valid. A. I. R. 1915 Mad. 711=24 I. C. 528, Foll. [P. 107, C. 2.]

K. Raja Aiyar—for Appellant.

T. Rangachariar and *T. Ramachandra Rao*—for Respondents.

Order.—We do not think, we can decide this appeal without a finding on the 1st issue as to the title of Gangamamba. The District Judge of North Arcot will be asked to return a finding in six weeks. Seven days will be allowed for filing objections. Evidence may be taken.

In compliance with the above order of this Court, the District Judge of North Arcot submitted the following.

Finding.—I am required by the High Court to submit a finding upon the 1st issue in this suit, the issue being whether Gangamamba Garu was entitled to half share in the collections as alleged in paragraph 3 of the plaint. The said allegation is that Gangamamba Garu owns and enjoys one-half out of the assessment, *jodi*, *russums*, etc., leviable upon all wet lands and dry lands cultivated with wet crops and *inam* lands in the Village of Dalavayipattada.

2. It is explained in this connection that within the Karvetinagar *zemindari*, there is a separate estate, known as the *mahal* estate, set apart for the maintenance of the ladies of the palace, and that it is managed by the senior most Dowager or *Rani* for the time being. This separate estate has existed from time immemorial. The Manager of the estate is known as the *mahal khavand*. In 1866 the then *zemindar*, Venkata Perumal Razu, executed the document, Exhibit A, to his mother Vijaya Lakshmamba Garu, who was then the *mahal khavand*. This document recites that the irrigation works of certain villages were out of repair and in consideration of Vijaya Lakshmamba Garu having them repaired and paying a certain sum as value of existing works out of her own private funds, she should have the *dasabandham* right of collecting half wet rents. The document finishes with recitals that this right should be enjoyed by her and her transferees, hereditarily from son to grandson and so on, with powers of gift, mortgage and sale so long as the sun and moon last. The plaint village of Dalavayipattada is included in the document.

3. It appears that after the death of Vijaya Lakshmamba Garu, Konamamba Garu, the senior wife of the grantor, Venkataperumal Raju, took possession of the *mahal* estate, and after her, the estate came to the possession of Gangamamba Garu, the junior wife of the grantor, who, however, had meanwhile died. The ladies of the *mahal* were incurring debts and living beyond their means, and so Konamamba Garu as *mahal khavand* on October 16th, 1888, executed the usufructuary mortgage-deed, Exhibit E, for the *dasabandham* right in various villages, including the plaint village, to the then *zemindar*. The *zemindar* was required to pay Rs. 61,265 to Chandrappa Naidu Garu and Papa Naidu Garu, to pay the *mahal* expenses, and other creditors and repay himself out of the *dasabandham* income giving back the property when he had entirely repaid himself. The *zemindar*, however, did not pay off Chandrappa Naidu and Papa Naidu, but merely hypothecated to them the rights which he had obtained under Exhibit E. The latter sued and obtained a decree which is now pending execution.

4. In 1894, the *zemindar* said he could not pay off the debts and the *mahal* might take back the property; but he executed no deed of release of the usufructuary mortgage. Gangamamba Garu was then the *mahal khavand*, and it is said she has been in possession ever since. In 1899, the Court of Wards took possession of the Karvetinagar Estate and remained in possession until 1905, but they did not interfere with Gangamamba Garu's right to *dasabandham*. The owner of the *ayan* right has always collected the whole rent and paid over the *dasabandham* share to the *dasabandhamdars*.

5. In consequence of a personal decree against the *zemindar*, the village of Dallavayipattada was brought to sale on October 22nd, 1895, and was purchased by the *zemindar* of Bangari Polliem, *vide* Exhibit B, the sale certificate. This certificate gave all the *tirvas*, *miras*, *jodi* allowances and other rights appertaining to the defendant *zemindar*. The plaintiff is a double transferee of the *dasabandham* right from Gangamamba Garu.

6. Upon the hearing of this remand, two further witnesses (Nos. 5 and 6) were examined for the plaintiff and four documents, Exhibits KK, LL, MM and NN, were exhibited. For the 1st defendant, Exhibits XVII and XVIII were filed. The parties also rely upon evidence already on

record. P. W. No. 5 was a *gumastah* under the *Zemindar* of Karvetinagar for 35 years, and he made the copy, Exhibit KK1, of the letter sent by the *zemindar* in 1894, saying that he, the *zemindar*, could not pay off the debts, and the *mahal* could take back the usufructuary mortgage which had been given to him. The original of this letter has been filed in some previous suit and been lost. It is objected that this letter is inadmissible as evidence for want of registration. The objection is good in so far as the documeet might be used to prove in itself the extinguishment of the mortgage right, but it is admitted in evidence to explain how the *dasabandham* right came back to Gangamamba Garu in 1894. This witness says further that the *zemindar* was meeting the *mahal* expenses during the continuance of the usufructuary mortgage, *i. e.*, from 1888 to 1894, but not before or after. P. W. No. 6 says he has been a *gumastah* to the *mahal* estate for 15 years. The original letter of 1894, (Exhibit KK1) was filed in Original Suit No. 269 of 1900 in the Tirupati District Munsif's Court, but was not reclaimed and was destroyed. The *gumastah* speaks to the custom of the estate, that it is managed by the senior *rani* for the time being. He also produced the *mahal chitta*, Exhibit LL, from 1902 to 1904, showing receipts of *dasabandham* amounts from Dalavayipattada for *Faslis* 1308, 1309 and 1310, and he says the *mahal* was in possession from the year *Jaya* (1894-1895). Exhibit MM is a letter of 1900 from the Manager to the Court of Words stating that the Court had not taken the management of the *mahal* villages.

7. I think it is clear from the evidence now produced and from that already on record that there is, and has been from time immemorial, a *mahal* estate for the benefit of the ladies of the *mahal*, and that it is managed by the senior *rani* for the time being, *vide* also Exhibits O and O1 where the *zemindar* in 1888 set out the *mahal* theory. The first objection taken for the 1st defendant is that Gangamamba Garu was not a proper heir under Hindu Law to succeed to property left by Vijaya Lakshmamba, her mother-in-law. This would, no doubt, be a valid objection were the estate the absolute property of Vijaya Lakshmamba, but as the estate was the joint property of the members of the *mahal*, and Vijaya Lakshmamba was merely the manager or *khavand* for the time being, and as Gangamamba Garu inherited merely as manager or *khavand* on behalf of the *mahal*, the objection will not hold.

8. The next objection is that the grant Exhibit A specified that the property should descend to son and grandson, and, therefore, the son and grandson of Vijaya Lakshmamba (*i. e.*, the *zemindars*) are the legal heirs. In the *first* place, Exhibit A is an outright conveyance, and any limitation and conditions in it are void. In the *second* place, it is said for the plaintiff that the expression "son to grandson" is mere figurative language implying absolute transfer (*vide* latter part of paragraph 2, *supra*), and this I consider is the correct interpretation to put upon it. The argument is that the *zemindar* was rightfully entitled to the *dasabandham* right, which, therefore, came to the auction-purchaser under Exhibit B.

9. The plaintiff relies upon certain documents, as mentioned above, to prove that Gangamamba Garu was in possession of the *dasabandham* right after 1894 and that the *Zemindar* of Bangari Polliem acknowledged her right. I do not think it necessary to specify the Exhibits (H, H1, K, L, L3 to L9, F, etc.,) and the evidence further, as they clearly prove the point. The 1st defendant in reply pleads that he only recently came to know of the transactions between the *mahal* and the *zemindar*, the usufructuary mortgage and the invalid relinquishment, and he cannot, therefore, be bound by any admission which he previously made. I consider that this is a contention which must be allowed.

10. The important question in the issue is whether the relinquishment by the *zemindar* in 1894 can have any legal force. The letter, Exhibit KKI, is undoubtedly a non-testamentary instrument which purports to extinguish an interest of the value upwards of one hundred rupees in immoveable property, and it, therefore, requires registration under S. 17 of the Registration Act. It is contended for the plaintiff that it is open to a mortgagee at any time to remit the debt and say he does not require the security, and that it would not be neces-

sary in such a case to execute a registered relinquishment-deed. In the present case, however, the matter is further complicated by the fact that the mortgagee did not pay the debt in consideration of the mortgage, but further mortgaged his mortgage right to the creditors. The creditors brought a suit, Original Suit No. 39 of 1900, in the Sub-Court and obtained a decree (Exhibit XVII) for the amount due to them upon the security of the mortgage right to the *zemindar* (Exhibit E), and this decree is still awaiting execution. It does not appear from the decree that the relinquishment of 1894 was admitted or even pleaded in that suit. I entirely fail to see how the *zemindar* could give up his mortgage right by a mere letter when he had mortgaged it to others. It is, therefore, argued that on the day of the Court sale in 1895, the *zemindar* had a right to be in possession of the *dasabandham* right as a usufructuary mortgagee, and that this right passed to the *Zemindar* of Bangari Polliem under Exhibit B.

11. The Court sale of 1895 was in execution of the decree in Original Suit No. 378 of 1880 in the High Court. The attachment of the *zemindar's* interest in certain villages, including Dalavayipattada, was made on August 3rd, 1885, and it was in pursuance of this attachment that the sale of 1895 was held. It is argued for the 1st defendant that the relinquishment of 1894 was invalid during the continuance of the attachment of 1885, but on the other hand, the *zemindar* did not acquire his usufructuary mortgage right under Exhibit E until 1888. The usufructuary mortgage right is entirely separate and distinct and certainly cannot be regarded as a mere accretion to the rights which were attached in 1885. If there was no attachment of the usufructuary mortgage right, there could be no valid sale of it, and it cannot be regarded as included in the Court sale of 1895 for which Exhibit B is the certificate.

12. My finding under the 1st issue must be that Gangamamba Garu was entitled, as manageress of the *mahal* properties for the time being, to a half share in collections, but that her rights were subject to a usufructuary mortgage (Exhibit E) to the *zemindar*, who had in 1894 waived his right to possession and given back possession to Gangamamba Garu.

The new evidence and printed papers are returned herewith.

This appeal coming on for final hearing, after return of the finding on the 15th, 16th, 22nd and 23rd February 1915, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Ayling, J.—The subject-matter of the present litigation is the *dasabandham* rights in the village of Dalavayipattada in the Karvetinagar *Zemindari* originally granted by the *zemindar* in 1866 by Exhibit A. They are claimed by the plaintiff (1st respondent) in virtue of an assignment of a usufructuary mortgage (Exhibit C) executed in 1905 by Gangamamba, and the first question is whether this lady was possessed of the *dasabandham* rights at that time.

According to the plaintiff, the grant by Exhibit A, the genuineness of which is not disputed, was really in favour of the "*mahal* estate." It is explained that this estate constitutes a sort of endowment for the benefit of the ladies of the *zemindar's* family, and is managed by the senior married lady for the time being. This estate is of a somewhat unusual nature, and the appellant's Vakil has commented on the meagreness of the direct evidence adduced to prove its existence. On the other hand, the documentary evidence (in particular Exhibits E, F series, M, O and OO) shows the clearest admissions on the part of the appellant (the 1st defendant) and his predecessors-in-title, not only that such an estate existed, but that the plaint *dasabandham* rights formed part of its assets, and that Gangamamba was entitled to enjoyment of the said rights. I consider that the decision of the District Judge on all these points in favour of the plaintiff was justified. I am unable to accept the appellant's contention that an estate of this kind in any way offends against the doctrine of perpetuities.

As regards Exhibit E, I am of opinion that apart from all questions of the admissibility in evidence of Exhibit KK(1), there is evidence to show that in 1894 the *zemindar* Bomma Raju relinquished his usufructuary mortgage rights under

that document (Exhibit E) and gave back possession thereof (in so far as *dasabandham* rights could be the subject of possession) to Gangamamba. It cannot be held that these *dasabandham* rights formed part of the property purchased by the 1st defendant's brother under Exhibit B. It being thus found that the plaintiff as assignee from Gangamamba was entitled to receive the plaint *dasabandham* dues, it only remains to decide whether the District Judge was right in giving a decree for their recovery from the Ist defendant.

Whether or no, the holder of the *dasabandham* rights would be legally entitled to recover his dues direct from the individual *ryots* of this village is open to doubt, although such a procedure would seem to be contemplated by Exhibit A and for some periods may have been actually resorted to. The difficulties attendant on it are, however, obvious: and it is quite clear that the 1st defendant's brother and predecessor who had succeeded to the rights and liabilities of the grantor of Exhibit A, undertook to collect the whole revenue of the village and to pay to Gangamamba the amounts due to her on account of *dasabandham* dues—*vide* Exhibit F, dated 5th April 1903, in which he specifically requests her to refrain from making collections on her own account, and undertakes to pay her the amount due to her for *dasabandham*. It is likewise clear that the Ist defendant on succeeding his brother accepted the same liability and that up to the beginning of 1907, there was no modification in the system. Shortly before that, the 1st defendant as proprietor of the village had granted a lease of the same for 10 years to the defendants Nos. 2 and 3. (*Vide* Exhibit D.) It would appear from Exhibits M and M1, that in March 1907 the Ist defendant directed the plaintiff, as mortgagee under Gangamamba, to receive the *dasabandham* dues from the lessees (defendants Nos. 2 and 3). What steps were taken by the Ist defendant to direct the defendants Nos. 2 and 3 to pay the same to the plaintiff, does not appear: but it is clear that they made no such payments, and in fact, have throughout denied their liability to do so.

They rely on Exhibit D as defining their liability under the lease: and admittedly this document only provides for the payment of a fixed annual rent of Rs. 900. The 2nd defendant claims that he and the 3rd defendant are entitled under the lease to appropriate the whole rent of the village (or so much of it as they can collect) less this amount. Whatever the rights under this lease (Exhibit D) may be, must form the subject of a separate litigation: the primary liability of the 1st defendant remains and was, in my opinion, rightly enforced by the decree of the District Court.

I would dismiss the appeal with costs. (Two sets.)

Tyabji, J.—This appeal arises out of a suit in which the plaintiff claims to be paid by the defendants, a half share of a certain cess (referred to as the *dasabandham* cess) recoverable from the *ryots* of Dalavayipattada village. The right to recover the other half share of the *dasabandham* cess is not in question before us, and I shall throughout speak of the cess as referring to the half of it which is the subject of this suit. The plaintiff has obtained a decree against the 1st defendant who now contends that, if the plaintiff has any right at all,—which is denied—it is against the 2nd and 3rd defendants.

The defendants' position appears from the following facts. On the death of Rajah Venkataperumal, the grantor of the *sanad*, (Exhibit A), his son Bomma Razu succeeded him and all his property was seized and sold in 1895 in execution of a decree in Original Suit No. 378 of 1880. In the auction-sale in execution of that decree, the 1st defendant's elder brother and predecessor-in-title purchased Bomma Razu's interest in the *dasabandham* cess in question in addition to the other rights of Bomma Razu in the same property. The sale certificate, Exhibit B, is dated the 19th February 1896. The 2nd and 3rd defendants are lessees under the 1st defendant. The lease is Exhibit D dated the 21st September 1906. It is for a term of 10 years relating back to the 1st July 1905. (See paragraphs 1, 2 and 18 of Exhibit D.)

The question from the point of view of the defence, therefore, is whether Bomma Razu had any interest in the *dasabandham* rights, claimed by the plaintiff. The plaintiff's and the defendants' claims are, it is evident, exclusive of each other. They

cannot both have title to the same rights and to some extent, the defendants' case is based on a denial of the title of the plaintiff. The defendants, however, raise some further contentions which will have to be dealt with separately.

The plaintiff's alleged right is traced ultimately to a *sanad* of 1866, Exhibit A, under which Raja Venkataperumal, the then *Zemindar* of Karvetinagar, granted to his mother, Vijaya Lakshmamba Garu, the right to levy and enjoy a moiety of the *dasabandham* cess by her and those authorized by her, and by her transferees "hereditarily from son to grandson, and so on with powers of gift, mortgage and sale so long as the sun and moon last." The next step in the plaintiff's title is the alleged devolution of this right from the grantee Vijaya Lakshmamba Garu upon Konamamba Garu, the senior wife, and from her upon Gangamamba Garu, the junior wife, of the grantor, namely, the *zemindar*. The first question that has to be considered, therefore, is whether this alleged devolution can be held to have taken place and can be recognized in law; and in this question two points are involved: (1) whether the terms of the grant being such as they are, any person other than "the son, grandson and so on" can be considered to have succeeded to the rights granted under Exhibit A; and (2) assuming that a devolution other than that to which the grant refers, can prevail, then, whether the particular mode of devolution relied upon by the plaintiff, can be upheld.

Both these points are somewhat closely connected with each other; for the son of the grantee is the grantor himself, and it appears that the son and the grandson of the grantor have been dealing with Vijaya Lakshmamba, Konamamba and Gangamamba in such a manner that it is impossible to hold that there were any rights left in favour of the grantor in what was purported to be granted away. Moreover, the words cited from Exhibit A, appear to have been used clearly as words of limitation and not of purchase. They indicate that the grantee was to take the fullest and most absolute estate in the rights granted.

It is desirable at the outset to refer to the fact that the *dasabandham* cess has been purported to be granted and usufructuarily mortgaged exactly as though it were actual land; and in the arguments before us, the same assumption was made throughout.

The rule of devolution under which the plaintiff claims, depends upon the existence of a custom. The question of fact involved in the proof of the custom [*Cf. Kunhambi* v. *Kalanathar* (1)] was considered by the learned District Judge in the finding which he has submitted to this Court on the first issue. He came to the conclusion that there was a custom prevalent in the *Zemindari* of Karvetinagar laying down a particular rule of inheritance with regard to property held by the ladies of the *zemindar's* family and derived from the *zemindar* in the first instance for the purpose of maintenance. The alleged custom is that the property, unless it has been alienated during the life-time of the ladies entitled thereto, devolves upon the other ladies of the *zemindar's* family who would for the time being be entitled to be maintained out of the *zemindari* funds.

The appellant attacks this finding on what may be analysed as three distinct grounds. It is *first* argued that the custom is too uncertain to be given effect to; *secondly*, that it is opposed to public policy, because it ties up property indefinitely; and *finally*, that it has not been satisfactorily proved to have been prevalent and to have been acted upon for a sufficiently long period with a consciousness that it has the force of law.

There is nothing uncertain about the custom as alleged. Certainly, it is not more difficult of ascertainment than the claims for maintenance of the members of the *zemindar's* family.

The argument that it is opposed to public policy must also fail, because the custom does not restrict the devolution of property, but at the most earmarks property for a particular purpose leaving each holder of it for the time being a wider power of disposition than in the case of property assigned in lieu of maintenance. The custom appears to be reasonable when considered in the light of the fact that the ladies of the *zemindar's* family must have some provision made for their maintenance and that this provision in order to be adequate must be of a stable nature and commensurate with the dignity of the

(1) A. I. R. 1915 Mad. 711=24 I. C. 528.

ladies. The custom is well calculated to bring about these results.

With reference to the evidence of its prevalance in the Karvetinagar *Zemindari*, I am not prepared to say that the learned Judge was wrong in the finding at which he has arrived, especially in view of the documents and of the admissions of the parties most nearly concerned and of clear indications that it was recognised as binding by persons who would have been most interested in questioning its binding force. The persons that would have the best information upon it, would be the members of the Karvetinagar *Zemindar's* family, and not the present plaintiff and defendants. The conduct of the *zemindars* in the past and of members of their family, bear strong testimony to the existence of the custom.

The only alternative to the recognition of the custom suggested by the appellant is that on the death of Vijaya Lakshamamba Garu her son Venkataperumal, the grantor himself, and on his death, his son Bomma Razu who next succeeded to the *zemindari*, inherited this right. This alternative cannot be entertained in view of the events that have taken place and of the conduct of Bomma Razu. For Bomma Razu took a mortgage of the same right on the 16th of October 1888 (Exhibit E), five years after Vijaya Lakshmamba's death. It was argued for the respondents that Bomma Razu as the mortgagee of this right, was estopped from denying his mortgagor's title; and Coote on Mortgages, Volume II, page 1434, *Pearce* v. *Morris* (2), *Kinniard* v. *Trollope* (3) and *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (4) were relied upon for this proposition. In view of the events that have taken place and of the present title of the parties, it is difficult to apply the rule of estoppel; but it is unnecessary to consider whether it is applicable. In any case, Bomma Razu would not have taken a mortgage of the *dasabandham* rights if he had conceived himself to be entitled to rights of full ownership in it; and the conduct of Bomma Razu is, therefore, strong evidence in favour of the existence of the custom. He was deeply interested in denying the existence and questioning the effect of the custom, he would have had intimate knowledge of facts enabling him to determine whether the custom was prevalent, yet he acted to detriment of his own interests in a manner which can only be explained on the basis of the existence of the custom and a consciousness of its having binding force. Exhibits O, O1, OO, E, LL, K, H, H1 need not be referred to in detail; they all support the same conclusion.

Assuming, however, that the custom relied upon by the plaintiff cannot prevail, after the death of Vijaya Lakshmamba Garu in 1883, her son Venkataperumal and on his death, his son Bomma Razu became entitled to the property, and their rights to take possession of the property have never been asserted and became barred long prior to the suit.

I, therefore, proceed on the basis that Gangamamba Garu was entitled to execute Exhibit C which purports to be a usufructuary mortgage of the *dasabandham* cess, and that the plaintiff who is the assignee of that mortgage, would be entitled to come to this Court in his right as mortgagee, subject to the defences with which I shall now deal.

In 1888, Konamamba Garu who, in accordance with the decision at which I have arrived that the custom relied upon by the plaintiff has been proved, must be taken to have been entitled to deal with the property now in question, executed what purports to be a usufructuary mortgage of it to her son Bomma Razu, Exhibit E. If that mortgage was subsisting at the date of the execution purchase on which the 1st defendant relies, then the plaintiff's right must be taken to be subject to that mortgage, and the plaintiff's suit must consequently fail. It must, therefore, be considered whether the mortgage under Exhibit E was subsisting. With reference to this, the plaintiff contends (1) that the mortgage was released by Exhibit KK (1), (2) that the mortgage right was lost by adverse possession, (3) that the alleged mortgage was nugatory inasmuch as no consideration passed for it, and (4) that the alleged mortgagee is estopped from setting it up as against the plaintiff.

These four contentions are based on different aspects of the same events or

(2) (1869) 5 Ch App. 227.
(3) (1888) 39 Ch. D. 636.
(4) (1909) 1 I. C. 264.

pieces of evidence. It may be stated at once that it is not possible to say that on the merits either the plaintiff or the defendants have established any case. On the other hand, the documents and the transactions in question indicate a gross mismanagement of the estate by the *zemindar* and a complete apathy as to the rights and legal positions of both the *zemindar* and the ladies of the family and unbusiness-like methods of dealing with valuable rights. Taking the whole of the events and documents together, it seems to me, however, for the reasons which I will state, that the plaintiff's contentions must prevail.

Exhibit E purports to be a usufructury mortgage. Its object was to provide for the payment of the debts incurred for *mahal* expenses by Vijaya Lakshmamba Garu ; and this was sought to be done by transferring the management of the 32 villages referred to in Exhibit E to Bomma Razu. On the true construction of Exhibit E, it appears that there was in fact no mortgage in favour of Bomma Razu and no consideration received from Bomma Razu, and the real effect of Exhibit E seems to be to entitle Bomma Razu to take charge of the property and to liquidate the debts which were due from the ladies out of the income of the properties referred to in Exhibit E, and after the debts had been liquidated, to hand back the properties to the ladies. This being the original nature and object of the transaction, it is unnecessary for the plaintiff to rely upon Exhibit KK (1) as in the nature of a re-assignment of the mortgage. It is enough for his purpose to refer to the fact that under the document, Bomma Razu would have been entitled to collect the rents and profits of the 32 villages and to pay off the creditors of Konamamba Garu thereout and if he had done so, he would have had a charge on the villages for the sums so paid out. He does not get any other right under the document. The arguments, therefore,

(*a*) that if there were any failure of consideration for Exhibit E, the only result of it would be that the mortgagor would be entitled to claim payment of the mortgage money and

(*b*) that in any case, the usufructuary mortgagee gets an immediate right to take possession of the property mortgaged and that this right cannot be affected by failure to pay the mortgage money.

These arguments have no application to the facts of the present case where what is dealt with, is the right to collect the moiety of a cess, and considerations which may be applicable to tangible property, cannot be applied.

It is clear also that Bomma Razu relinquished the right to take possession of the villages and that such a relinquishment does not require to be made by a registered document. [See *Thiruvengadachariar* v. *Ranganatha Aiyangar* (5).]

It was argued, moreover, that the auction-sale on which the 1st defendant relies for his title to the property, was based on an attachment of the 3rd August 1885, dated three years prior to the alleged mortgage under Exhibit E, that at that time, even according to the 1st defendant's case, Bomma Razu had no rights over the *dasabandham* cess now in question, and that it could not entitle the auction-purchaser to acquire rights which had not been attached for the reason that they had not come into being at the time. On the other hand, the 1st defendant relies upon S. 70 of the Transfer of Property Act and the decisions in *Ramasami Naik* v. *Ramasami Chetti* (6), *Muniappa Naik* v. *Subramania Ayyan* (7), *Raja Thakur Barmha* v. *Jiban Ram Marwari* (8), *Umes Chunder Sircar* v. *Zahur Fatima* (9), *Ajudhia Prasad* v. *Man Singh* (10) and *Surja Narain Mandal* v. *Nanda Lal Sinha* (11). It is clear that there is no such accession to the mortgaged property as is referred to in the Transfer of Property Act. It is, however, unnecessary in view of what I have already said to decide whether the comprehensive terms of Exhibit B, the sale certificate, were sufficient to transfer all the rights that Bomma Razu had in the property at the time of the execution sale and whether the absence of any express attachment of those rights, did not affect the purchase under Exhibit B.

In my opinion, therefore, the 1st defendant cannot rely upon the existence of

(5) (1903) 13 M. L. J. 500.
(6) (1907) 30 Mad. 255.
(7) (1895) 18 Mad. 437.
(8) (1914) 41 Cal. 590=21 I. C. 936 (P.C.)
(9) (1891) 18 Cal. 164=17 I. A. 201 (P.C.)
(10) (1903) 25 All. 46.
(11) (1906) 33 Cal. 1212.

any mortgage rights in favour of Bomma Razu at the time of the Court purchase on which the 1st defendant relies.

The 1st defendant's next contention is that the right of the plaintiff to recover the *dasabandham* cess must be asserted, if at all, against either the *ryots* themselves or as against the 2nd and 3rd defendants. This contention falls under the following heads : *first*, that the 1st defendant was under no liability to collect the *dasabandham* cess on behalf of the plaintiff ; *secondly*, that as a matter of fact, the 1st defendant did not collect the cess ; *thirdly*, that the right of the plaintiff is as against the *ryots*, not against himself ; and *fourthly*, that if there was ever any liability on himself to collect the cess, that liability has been transferred to the 2nd and 3rd defendants by virtue of the lease Exhibit D.

All these contentions, again, are based on different aspects of the same pieces of evidence, and it need only be said that owing to his conduct throughout as indicated by the evidence and especially by Exhibits F, F2, M, M1, and S, the 1st defendant cannot be heard to say that he is not liable to pay over the *dasabandham* cess from time to time—the translation of Exhibit F says "therefore, it is made known to you that the amount due to you will be duly paid to you now and then" meaning thereby "from time to time as the amounts are collected." The disclaimer of any liability to pay, contained in Exhibit GG dated the 20th February 1908, cannot affect the rights which had already become vested. It is unnecessary to decide in the present case whether the liability to pay to the plaintiff the *dasabandham* cess rest ultimately as between the defendants themselves, either upon the 1st defendant or or upon the 2nd and 3rd defendants. In my opinion, the right to receive the *dasabandham* cess has become vested in the plaintiff and by virtue of Exhibits F, F2, M, M1 and S the liability to pay the cess to the plaintiff, rests in the first instance upon the 1st defendant. Whether the 1st defendant assigned to the 2nd and 3rd defendants the right to collect the cess, or whether it is still vested in himself, or whether the 2nd and 3rd defendants are bound to pay the cess to the 1st defendant in addition to the payments they have already made, or whether they have discharged all the liability that rested upon them under Exhibit D and whether Exhibit D may entitle them to recover from the *ryots* the *dasabandham* cess to which we have held the plaintiff to be ultimately entitled——all these are questions which need not be considered in the present proceedings.

Finally, the question arises whether the Courts can recognise the existence of such a right as the plaintiff would be entitled to claim on the findings that we have given. We have had occasion recently in *Avula Charamudi* v. *Marriboyina Raghavulu* (12) to consider the incidence of S. 27 (*b*) of the Specific Relief Act and S. 40 of the Transfer of Property Act, and for the reasons mentioned in that judgment, I am of opinion that the English Law relating to covenants running with the land, is not applicable in India. I am of opinion that the obligation to collect and pay the *dasabandham* cess was annexed to the ownership of the Dalavayipattada village and as the 1st defendant is the transferee of the village with notice of the obligation, it may be enforced as against him. No reasons have been pointed out why the obligation which is capable of being specifically enforced, should not be so enforced. On the other hand, the principles which underlie S. 39 of the Transfer of Property Act favour the enforcement of the obligation.

I am, therefore, of opinion that the decree under appeal is right and that the appeal must be dismissed with costs (two sets of costs).

S. N./R. K.

Appeal dismissed.

(12) (1915) 28 I. C. 871.

A. I. R. 1916 Madras 110

Full Bench.

OLDFIELD, SESHAGIRI AIYAR AND NAPIER, JJ.

Public Prosecutor—Appellant.

v.

Kottaparambath Maliyakkal Kadiri Koya Haji—Accused.

Criminal Appeal No. 159 of 1915, decided on 30th April 1915, from the order of Addl. Dist. Magte., Malabar, in Calendar Case No 4 of 1914.

(a) Criminal P. C. (5 of 1898), S. 419—No special procedure for presentation of appeal is provided—What is valid presentation stated.

No special method is enjoined in the Code of Criminal Procedure for presentation of appeals. The question is one of administrative convenience ; so long as there is an an actual presentation to an officer of the Court, a Bench Clerk or one of the Judges, the presentation is not invalid. [P. 111, C. 2.]

(b) Madras High Court Rules (Original Side) Criminal—Rule 1 (1) (f)—Scope of—It does deprive divisional Courts to entertain application for admission of appeals—Benches constituted under S. 14, Letters Patent can also entertain and decide criminal appeals.

Rule 1 (1) (*f*) of the Rules of Practice of the Madras High Court which lays down that application for the admission of appeals should be made before a single Judge, does not in terms, and is not intended to, deprive the Divisional Courts constituted for the disposal of criminal business of the right to exercise their powers in special cases. [P. 112, C. 1.]

The rule providing for the disposal of all applications by the Admission Judge is not intended to restrict the powers of the Benches constituted under clause 14 of the Charter Act. Such Benches have jurisdiction to hear applications and appeals in criminal matters. 30 Cal. 588, foll. [P. 114, C. 2.]

(c) Criminal P. C. (5 of 1898), S. 233—Failure to conform to S. 233 vitiates trial.

S. 233 of the Criminal Procedure Code must be strictly construed. Failure to conform to the section at any stage of the trial renders the proceeding illegal. [P. 115, C. 1.]

(d) Criminal P. C. (5 of 1898), S. 537—S. 537 does not apply where trial itself is defective.

Clause (a) of S. 537, which speaks of " errors in proceeding before or during trial ", does not cover cases where the trial itself is defective. [P. 115, C. 1.]

(e) Criminal P. C. (5 of 1898), Ss. 233 and 537—Different charges framed but evidence recorded in one trial—This is an irregularity not curable by S. 537.

Where a Magistrate frames different charges, but allows the evidence on each charge to be recorded at one trial, and does not discriminate between that which is relevant on each of the charges it is not a mere irregularity cured by S. 537 of the Code of Criminal Procedure, but an illegality which vitiates the trial in its entirety. 29 Cal. 385; 25 Mad. 61 (P.C.); A.I.R. 1915 Cal. 296; 26 Mad. 592 ; A. I. R. 1915 Mad. 23; 32 Mad. 218; A. I. R. 1915 Cal. 292; 11 C. W. N. 54, Foll [P. 112, C. 1 & 2, P. 113, C. 1.]

(f) Criminal P. C. (5 of 1898), Ss. 423 and 439—Trial after a long delay—Trial irregular—Retrial should not be ordered.

Where no action was taken against the accused for over three years for an offence which he was alleged to have committed and when the trial did take place, it was conducted in an illegal manner :

Held, that having regard to the circumstances, a re-trial could not be ordered as the accused would labour under great disabilities. [P. 113, C. 2.]

T. Richmond and *A. Ramasami Mudaliar*—for Accused.

Oldfield, J.—The accused has been acquitted in Calender Case No. 4 of 1915 on a charge of an offence punishable under S. 420, Indian Penal Code, by the Additional District Magistrate of Malabar. A learned Judge thought it necessary to take up the case in the exercise of this Court's powers of revision. Whilst it was under the consideration of a Bench, Government instructed the Public Prosecutor to file the appeals, which are before us, against the acquittals in Calender Case No. 4 and Calender Case No. 5, a connected case. I deal at present with the former.

A preliminary objection to the hearing of both appeals has been made, that they were not legally presented and that they cannot be proceeded with, because the provisions of S. 421 of the Code of Criminal Procedure have not been complied with, inasmuch as the appeals were not duly presented to this Court and they were not perused and notice was not ordered by a Judge empowered for those purposes. The facts are that the Bench above referred to issued notice to the Public Prosecutor to appear at the further hearing of the revision case and also to inform the Court whether Government intended to appeal. He appeared and then handed in the appeals by Government now under disposal to the learned Judges, who perused them and ordered notice forthwith.

As regards presentation, no special method is enjoined in the Code of Criminal Procedure and, therefore, the question is one of administrative convenience alone. So long as there is, as there was in this case, an actual presentation to an officer of the Court, such as a Bench Clerk, or to one of the Judges, its members, I am not prepared to hold that the presentation was invalid. As to compliance with S. 421, accused relies on the note published as part of the weekly sitting list. "Urgent Criminal Appellate Side motions will be heard by the Bench before which the criminal work of the week is posted (and must be moved at 11 A.M.), unless an Admission Court is sitting in which case, if the motion can be heard by a single Judge, the application must be made before the Admission Court" and argues that, as an Admission Court

constituted by a single Judge was sitting on 15th March 1915, the date on which orders were passed under S. 421, that Court alone, and not the Bench of two Judges, was competent to peruse the appeals. It is a sufficient answer to this objection that under S. 13, Charter Act, rules for the exercise of the High Court appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by S. 14 to determine which Judges shall sit alone and which in Divisional Courts. It is by reference to the rules so made that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained, not by reference to the notes to the sitting list, which are merely instructions for the guidance of practitioners and parties. The rules made by this Court are contained in the appellate side rules; and under rule 1 (1) (*f*) applications for the admission of appeals from the judgment of any Criminal Court are ordinarily to be made before a single Judge. This does not in terms, and is not intended to, deprive the Divisional Court, constituted for the disposal of Criminal business, of the right to exercise its powers in special cases, such as those before us, in which convenience and the acquaintance with the circumstances, which the two learned Judges concerned had, rendered their intervention specially advisable. This objection must, therefore, fail.

I turn next to the argument relating to the conduct of the proceedings in the lower Court, on which Mr. Richmond, who appeared for the accused, has relied as a comprehensive answer to the appeal, in so far as the substitution of a conviction for the acquittal is asked for, and not merely an order for a re-trail. The relevant facts are that both Calendar Case No. 4 and Calendar Case No. 5 were instituted by the same complainant by the presentation of only one complaint, containing all the allegations necessary to the establishment of both cases, those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation, contained in Exhibit K, as to the amount of his assets. The Magistrate inspite, Mr. Richmond alleges, of his remonstrances, recorded the prosec ution evidence tendered on behalf of the complainant continuously without discriminating between that which was relevant on each of these two charges, examining each witness once as to all he knew regarding both and questioning accused under S. 342, Criminal Procedure Code, only once. He then, as his diary shows, "split" the case into Calendar Cases Nos. 4 and 5 and proceeded to the further cross-examination of the prosecution witnesses, which accused had claimed under S. 256 (1). It is not clear whether he bore in mind that he had two distinct cases to try during the cross-examination of 1st prosecution witness. For part of it is headed Calendar Case No. 5. But his attempt to do so, if he made one, was ineffective, since that part of the cross-examination is in fact relevant rather to Calendar Case No. 4. And in any case the attempt was abandoned almost immediately, no such distinction being made in the cross-examination of 3rd prosecution witness, who deposed regarding both the bills and Exhibit K, or of other witnesses. Subsequently one written statement was filed by the accused under S. 256 (2), and both cases were disposed of in one judgment. Mr. Richmond argues that this was one trial of separate charges of distinct offences, which offended against S. 233, that the trial was, therefore, not a legal one, and that, before accused can be convicted by this or any Court, a legal trial must be held.

There is no doubt that the offences in question in the two cases were distinct, and it is not suggested that Ss. 234, 235, 236 or 239 is applicable. It is also, in my opinion, the fact that, although two charges were framed, one trial only was held. For except in that respect the proceedings were, as pointed out above, in every way similar to those which would have taken place in one trial. It has not been shown how S. 233 is not in point, and accordingly the learned Public Prosecutor's efforts have been directed mainly towards establishing that there is in question only an irregularity, to which S. 537 is applicable.

This contention requires close scrutiny, because the effect of the leading case on the subject, *Subrahmaniya Ayyar* v. *Emperor* (1), is to discountenance any liberal application of the section and

(1) (1902 25 Mad. 61 = 28 I. A. 257 (P. C.)

because it is in terms inapplicable, as the Public Prosecutor would apply it here, to sustain the validity of a trial attacked by the accused only incidentally and not to resist directly a claim to the reversal or alteration of a decision in reference, appeal or revision. And there is in any case the direct objection, which I state in words borrowed from the decision already referred to : "When the Code positively enacts that such a trial as that which has taken place here shall not be permitted," it cannot be said "that this contravention of the Code comes within the description of error, omission or irregularity." This principle was applied to facts resembling those now in question in essential respects in *Gobind Koeri* v. *Emperor* (2) and *Raman Behary Das* v. *Emperor* (3), the latter case being authority also for a strict construction of S. 233. The only conclusion I can reach is that S. 537 is inapplicable and it is, therefore, useless to follow the Public Prosecutor in his contentions that no failure of justice has been occasioned by what occurred or that the accused did not raise his objection to it at a sufficiently early stage in the proceedings.

As accused has undergone no legal trial, he cannot be convicted and sentenced by us, and if we are to take action, the only course open to us is to order that he be tried a second time. It is no doubt true that in two respects the case is one in which interference with a decision of acquittal could be justified. For it is one of public importance, since the establishment of the charge would mean that the accused profited largely by conduct subversive of the existing system of mercantile credit ; and it is not, in my opinion, legitimate in one judgment to hold that accused has not been tried legally and to reach a conclusion that he is guilty, though the full argument we heard on the merits demonstrated that the Magistrate dealt most inadequately with one question of fundamental importance and never came to close quarters with the evidence. On the other hand, the charge deals with events in October 1910 and was made over three years later on the 15th May 1914. The explanation given for this delay is that accused's accounts and other documents, on which the prosecution largely depends, were not accessible to the complainant Bank, until proceedings in another case against accused had ended in this Court in September 1912. But I am not satisfied that the subsequent interval is not excessive ; and it is clear that after so long accused would labour under great disabilities. In the circumstances I do not think that the case is one for re-trial. In my opinion, therefore, the appeal must be dismissed.

Seshagiri Aiyar, J.—I have come to the same conclusion. Mr. Richmond has raised the objection that the appeal is not properly before us. The facts he relies on for this contention are these. The Public Prosecutor presented the appeal petition to Spencer and Coutts-Trotter, JJ., in Court through the Bench Clerk on the 15th March 1915. On that date, Mr. Justice Ayling was sitting in the Admission Court. Consequently it was not competent to the learned Judge to admit the appeal.

Before dealing with the objection, a few further facts may be stated. Under the orders of a learned Judge of this Court, the records of the present case were called for by the High Court. It was numbered as Criminal Revision Case No. 782 of 1914. On the 4th March, the learned Judges who heard the case sent a notice to the Public Prosecutor calling upon him to inform the Court whether the Government was prepared to file an appeal against the acquittal, and whether he would make any further representation in the matter. The revision case was adjourned to the 15th March. On this date, the incident referred to by Mr. Richmond took place. It is conceded that Spencer and Coutts-Trotter, JJ., were constituted a Bench for hearing criminal cases for the week in which the appeal was presented.

Mr. Richmond's *first* contention is that there was no valid presentation of the appeal. I am unable to agree with this argument. S. 419 contemplates a presentation by the appellant or his Pleader. The petition of appeal was handed over to the clerk present in Court by the Public Prosecutor. It has not been shown that the clerk had no authority to receive the

(2) (1902) 29 Cal. 385.
(3) A. I. R. 1915 Cal. 296=22 I. C. 729=41 Cal. 722.

appeal petition. Even if it be said that the presentation was to the Judges direct, I am unable to see why it is not a presentation to the High Court. Moreover, the learned Judges who heard the revision petition, having issued the notice, were certainly competent to receive the appeal which was presented to them in pursuance of that notice. There is no force in this contention.

The *second* argument rests on the fact that in the note appended to the cause list for the week it is stated that all applications relating to criminal matters should be made before the Judge sitting in the Admission Court, and that consequently the presentation of the appeal for Admission to the two learned Judges while there was an admission Court was improper. Speaking for myself, I accept the contention of the learned counsel that when the Public Prosecutor presented the appeal petition to the learned Judges he moved for its admission. Rule 1 of the Appellate Rules of Practice speaks of it as an application. I do not think that the admission of the appeal is a partial hearing of the appeal itself. I proceed on the assumption that when an appellant asks the Court to admit an appeal, he is making an application in a criminal matter. In this case, it was an urgent application, as the hearing of the revision petition which was stayed depended upon the admission of the appeal. The question then arises, whether the Criminal Bench was deprived of jurisdiction to admit the appeal because an Admission Court was sitting. The rule only says that ordinarily all applications of this kind should be heard by the Admission Judge. Under clause 13 of the Charter Act, the High Court can make rules for the exercise, by one or more Judges, of the original and appellate jurisdiction vested in the Court. Clause 14 empowers the Chief Judge to determine what Judge shall sit alone and what Judges can constitute a Bench. It was under this clause, the two learned Judges were constituted a Bench to hear and determine criminal cases. They had jurisdiction to dispose of all criminal matters during the week of their sitting. Their jurisdiction was not taken away, because a single Judge was entrusted with the duties of admitting appeals. Stress was laid on the foot-note to the cause list to which I have already referred. I have no hesitation in saying that it was not intended to restrict the powers of the Benches constituted for the week. It was only an intimation to the practitioners as to the course they should adopt. It may be taken also as a suggestion to the Benches not to encourage applications made to them otherwise than in accordance with the note. Every Judge of the High Court would certainly act on the suggestion. But there can be no warrant for arguing that this note deprives the Criminal Bench of its jurisdiction to hear applications. There is nothing in S. 14 which would enable such a limitation being placed on the powers of a Bench. Clause 36 of the Letters Patent on which Mr. Richmond relies is not against this view. As pointed out in *Haladhar Maiti* v. *Choytonna Maiti* (4), the Chief Justice has power to constitute a Bench even in the absence of rules made under clause 13 ; and when a Bench is constituted, it has jurisdiction to hear applications and appeals in criminal cases. I agree in holding that the appeals were properly before us.

Mr. Richmond finally contends that even if we are satisfied that the judgment of the lower Court is wrong, we ought not to convict his client of the offences charged, as the trial was illegal in that it contravened the provisions of S. 233 of the Code of Criminal Procedure. It is to be regretted that such an objection should be taken at this late stage.

Mr. Richmond states that he objected at the outset to evidence being let in without specifying the charges on which the accused is to be tried. Although there is authority for the position [See *In the matter of Govindu* (5)] that the letting in of evidence before framing a charge in respect of separate allegations is not obnoxious to S. 233 of the Code of Criminal Procedure, I think that the procedure is not calculated to advance justice. In *Tanguturi Sriramulu* v. *Nalam Krishna Row* (6) and in *Palaniandy Gounden* v. *Emperor* (7) it was laid down that a *trial commences only after the charge is framed.* It is no doubt true that as the accused pleads only to the charge, his trial com-

(4) (1903) 30 Cal. 588.
(5) (1903) 26 Mad. 592.
(6) A.I.R. (1915) Mad. 23=25 I.C. 1001=38 Mad. 585.
(7) (1909) 32 Mad. 218=1 I.C. 54.

mences really after the charge. Nonetheless, he is practically on his trial from the moment the prosecution starts the case. However that may be, in this case we are concerned only with what happened after the charge was read out. The Magistrate rightly enough framed separate charges and numbered the cases as Calender Cases Nos. 4 and 5 of 1914. But when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. I do not think the fact that he noted the further cross-examination of the 1st witness as in Calendar Case No. 5 is of any consequence, because that examination was not in reference to the charge framed in that case. Under these circumstances, there can be no doubt that the trial offends against the provisions of S. 233.

It was argued by the learned Public Prosecutor that as the reading of the charge and the numbering of the cases were not improper, the further irregularity in not recording evidence separately did not vitiate the trials. The section says that each charge shall be tried separately and the failure to conform to it at any stage of the trial renders the proceeding illegal. See *Subrahmaniya Ayyar* v. *Emperor* (1) *Govind Koeri* v. *Emperor* (2) and *Raman* v. *Behary Das* (3). In *Emperor* v. *Madan Mondal* (8) the learned Judges point out that if the mode of trial was wrong, the proceedings ought to be set aside.

Mr. Grant's more serious contention was that S. 537 cured the defect. In the *first* place, the section has no application. The language of the first part of the section is against the conclusion which the Public Prosecutor asks us to adopt. In the *second* place, clause (*a*) which speaks of error "in proceedings before or during trial" does not cover cases where the trial itself is defective. Consequently, the explanation which introduces the principle of acquiescence under certain circumstances has no application. Moreover, as the Judicial Committee has held that a violation of a plain provision of law is not an irregularity, the section has no application to the present case. In *Moharuddi Malita* v. *Jadu Nath Mondal* (9) the error related to the framing of the charge, which is distinctly dealt with in clause (*a*) of S. 537 of the Code of Criminal Procedure. Moreover, in that case the trial was perfectly regular. I am, therefore, of opinion that the joint trial of the two calendar cases is opposed to S. 233 and that consequently the accused should not be convicted of the offences charged against him

I feel little doubt on the records before us that the accused is guilty of at least two out of the three counts mentioned in the charge in Calendar Case No. 4. Ordinarily such a failure of justice would warrant a re-trial of the accused. But the offence took place in October 1910 and the accused has been before the Criminal Courts on three occasions. Under these circumstances, I agree in holding that it is not desirable to direct a re-trial.

Napier, J.—I concur. I do not, however, think that the decision of the Privy Council in *Subrahmaniya Ayyar* v. *Emperor* (1) compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of S. 537 of the Code of Criminal Procedure. In the manner in which this case comes before us that section, however, cannot be relied on and we have only to apply S. 233. The only question that remains is, what course we must adopt being satisfied (1) that the accused has been tried illegally, (2) that his acquittal on the merits on two of the charges was wrong, (3) that in the circumstances we do not think that he should be re-tried on those charges. It seems to me that we must do what the lower Court could have done if its attention had been drawn to the illegality of the trial before judgment, that is acquit the accused, which in our opinion is done by dismissing the appeal.

S. N./R.K.

Appeal dismissed.

(8) A.I.R. (1915) Cal. 292=22 I.C. 731=41 Cal. 662.

(9) (1907) 11 C. W. N. 54.

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SADASIVA AIYAR AND NAPIER, JJ.

Mahomed Kadir Mohideen Saib—Plaintiff—Appellant.

v.

Gulam Mahomed Ali and *another*—Defendants—Respondents.

Original Appeal No. 103 of 1913, decided on 26th January 1915, from the Judgment of Wallis, J., dated 26th November 1913.

(a) Mahomadan Law—*Waqif—Mutwalli*—Original *inam* for worship of mosque resumed and granted in name of *mutwalli* to grantors—Grant held to original grantors and not to *mutwalli* personally.

Where the villages granted by the Muhammadan Government as *inam* for carrying on the religious worship in a mosque, were resumed by the British Government and given back to the grantors, but the *inam* title-deeds were issued in the name of the *mutwalli* for the time being to be nominated by the grantors:

Held, that the intention was to make a grant of the villages an *inam* to the original *waqif* or founder of the endowment and not to the *mutwalli* himself personally. [P. 125, C. 1.]

(b) Mahomadan Law—*Waqif—Mutwalli*—Where *mutwalli* to be appointed by each successor of grantor—Office of *mutwalli* is not hereditary.

Where the *mutwalli* of a mosque has to be recognised and reappointed at each succession by the *waqif* the former cannot claim a hereditary right in such office nor can a Will made by his father in his favour enhance his right in this respect. [P. 117, C. 1.]

(c) Mahomadan Law—*Waqif—Mutwalli* can be removed by grantor—Failure to account is proper reason for removal.

A *mutwalli* of a mosque is entirely subject to the control of the *waqif* and is removeable by him at his will for proper reasons. [P. 122, C. 1.]

Where a *mutwalli* defies the authority of the *waqif* and fails to submit accounts when required to do so, a proper reason exists for his removal. [P. 122, C. 1.]

(d) Act of State—Resumption of *inam* cannot be questioned by Municipal Courts—Crown.

A resumption by the Sovereign of an *inam* is an act of sovereignty which cannot be questioned by Municipal Courts. 7 M. I. A. 555, Foll. [P. 117, C. 2.]

(e) Mahomadan Law—*Waqif*—All mosques should be treated as intended for use by Mahommadan public.

Sadasiva Aiyar, J.—No distinction should be drawn between mosque and mosque, and all mosques should be treated as being intended for use of the Mussalman public in the same degree. 7 All. 461, Foll. [P. 117, C. 2.]

(f) Mahomadan Law—*Waqif*—succession of *mutwalli* is governed by rules framed by grantor and not by general law.

A determination of the question of succession to an office in a mosque endowment depends not on the general law of property, but upon the rules which the founder of the endowment established. 8 Mad. H.C.R. 63, Foll. [P. 119, C. 1.]

(g) Mahomadan Law—*Waqif*—Ordinarily power of removal of *mutwalli* vests with *Kazi*—It may be reserved and exercised by grantor provided not prejudicial to mosque.

Ordinarily under the Muhammadan Law the power of the removal of the *Mutwalli* is vested in the *Kazi* but if under the original scheme, settled by the *waqif* the grantor reserved to himself and to his heirs the power of removing the *mutwalli* and of making nominations from time to time, such a power would not be illegal, provided it is not detrimental to the interests of the mosque. 37 Cal. 263, Foll. [P. 119, C. 2.]

(h) Mahomadan Law—Majority under—Majority Act does not apply to office.

The age of majority fixed by the Indian Majority Act does not apply to offices which involve the performance of religious duties. [P. 122, C. 2.]

(i) Pensions Act (23 of 1871), S. 6—Certificate under S. 6 is necessary to sue for revenue granted to religious office.

A right to collect Government Revenue from the villages granted as an endowment to a religious office, cannot be sued for in a Civil Court, unless upon a certificate obtained under S. 6. [P. 123, C. 1.]

D. Chamier, M. D. Ramadoss, R. N. Aiyangar, Rencontre and *Tirumalai Pillai*—for Appellant.

T. Pattabhirama Aiyar and *O. P. Ramaswami Aiyar*—for Respondents.

Sadasiva Aiyar, J.—The plaintiff (appellant) was born on the 28th May 1895, (See Exhibit K). This suit was brought in October 1912, when he was a minor, through a next friend. The plaint prayed (mainly) for the following reliefs: (*a*) A declaration that the plaintiff was the lawful *mutwalli* of the two mosques in Madras called the Wallajah and Anwari Mosques and of the endowments attached thereto; (*b*) that the agreement, Exhibit A, executed by the plaintiff in December 1911 when he was 16 years old in favour of the 1st defendant, the Prince of Arcot, was null and void and not binding on the plaintiff; (*c*) that the alleged dismissal of the plaintiff from the office of *mutwalli* (Exhibit G) by the 1st defendant was *ultra vires* and wrongful and the alleged appointment of the 2nd defendant as *mutwalli* by the 1st defendant was also *ultra vires*; (*d*) that an account be taken from the 1st defendant of the receipts and disbursements of money made by him from January to June 1912; and (*e*) that the defendants may be restrained by an injunction from collecting the rents and profits of the plaint property and interfering with the

management of the mosques and properties of the plaintiff.

It is clear from the plaint that, though the fact that from the time of the plaintiff's great-great-grandfather the office of *mutwalli* has been held by him and his descendants in regular succession, is mentioned, the plaintiff does not claim that the office itself is a hereditary one in the sense that a son is entitled as of right to succeed to his father. The plaintiff is himself only a younger son, his elder brother being alive. In paragraph 6 of the plaint, the plaintiff says that he succeeded to the office of *mutwalli* on or about 28th December 1911 in accordance with the Will, dated 16th November 1911, made by his father (his predecessor-in-office) who died on the 12th January 1912. It is rather difficult to understand how, when the father died only on the 12th January 1912 and when the Will (Exhibit O) dated 15th November 1911 could and does speak only from the date of the death of the father, the plaintiff could have succeeded to the office on the 20th December 1911 itself, which date is neither the date of the Will nor the date of the father's death. Paragraph 4 of the Will (Exhibit O) clearly says " on my death, you Muhammad Kadir Mohideen *alias* Badsha shall forthwith take charge of the mosque properties and Shayanavaram *jagir* and conduct the office of *mutwalli* in accordance with the provisions of Muhammadan Law." However, the plaintiff, as I said before, does not claim a hereditary right in the office but lays claim to it because he was nominated by his father, the previous *mutwalli*, as successor. One of the principal questions in his case, therefore, is whether the succession to the office of *mutwalli* of the two plaint mosques takes place by the nomination and appointment of the prior office-holder, or whether the power of appointment on a vacancy rests in the Prince of Arcot (the 1st defendant).

The learned trial Judge has dealt with the history of the institution at great length (see from line 25 in page 21 of the printed judgment to the end of page 30) and it is, therefore, unnecessary for me to go through the same ground in detail. The first *mutwalli* was appointed in 1792 by the then Nawab of Arcot. The Nawabs of Arcot were independent Sovereigns till 1801. In 1801, the East India Company as sovereign authority took possession of all the properties belonging to the Nawab or over which the Nawab exercised sovereign rights, including the two plaint mosques and the *jagirs* of Ismail Kuppam and Shayanavaram connected with the mosque endowments. Though these mosques were named after two deceased Nawabs and were treated as if the Royal House of the Nawab of Arcot was more specially connected with these mosques than with ordinary mosques erected for the use of the public, I am of opinion that under the Muhammadan Law no distinction should be drawn between mosque and mospue and that all mosques should be treated as being intended for the use of the Mussalman public in the same degree [See *Queen-Empress* v. *Ramzan* (1)]. The founder, *waqif* of these mosques and their endowments was the Nawab of Arcot. The Government Revenue obtainable from the tenants of Ismail Kuppam amounting to about Rs. 150 a year, was dedicated to the endowments in order to meet the expenses of lighting the mosques and of maintaining the establishment connected with the services in the mosques. The Government revenue income from the *jagir* of Shayanavaram, amounting to about Rs. 200 or Rs. 195 a year, was granted to be enjoyed by the plaintiff's great-great-grandfather who was appointed the first *mutwalli* in or about 1792. These *jagirs* were granted in 1797 and 1798 (see Exhibits W and Y), the expenses of the endowments having been met till then by a daily payment of Rs. 3 to the *mutwalli* (See Exhibit U). When His Highness Oomdatul Oomrah, Nawab of Arcot, died in 1801, the Company assumed the sovereign powers and resumed, as such Sovereign, the plaint *jagir* villages and took possession of all the territories of the last Nawab. Such a resumption was an act of sovereign power which cannot be questioned by the Municipal Tribunals, [See *East India Company* v. *Syed Ally* (2)]. The heir of the Nawab of Arcot in November 1802 requested the Government to restore to himself the *jagirs*. Thereupon in April 1803, the Government passed proceedings in accordance with which the Secretary to

(1) (1885) 7 All. 461.
(2) (1857-59) 7 M. I. A. 555.

Government wrote to the Collector of North Arcot (Exhibit IX), which directs the Collector to restore to the servants of his Highness the Nawab of the Carnatic the two *jagir* villages. In issuing the title-deeds in obedience to the above order, some mistakes were made by the Collector at first. But the final order of the Government in this matter is evidenced by Exhibit XVII, dated the 27th December 1822, which recites that the Collector has been instructed to enter the two villages in the *Inam* Register as an endowment to the two mosques to be administered by the *mutwalli* so long as he shall retain the situation of *mutwalli* of the said mosques under the orders of His Highness the Nawab of Carnatic. These proceedings of the Governor-in-Council, dated December 1822, were passed in accordance with the request of the Nawab of the Carnatic contained in his letter, Exhibit XVI, dated July 1822. It is quite clear to me that the Madras Government intended that the Nawab of the Carnatic should have full power to deal with the office of *mutwalli* and intended to recognise as *jagir*-holder whomsoever, from time to time, His Highness thought fit to recognise as *mutwalli*. When the *Inam* Commissioner came to deal with these *Inam* villages, the Prince of Arcot wrote a letter (Exhibit XXII-A) in October 1872 requesting that the *inam* title-deeds of these two villages may be issued in His Highness's own name instead of that of the *mutwalli* as the *mutwalli* was merely a servant of His Highness and as the real superintendence of the mosque rested in the Prince himself. (See paragraphs 3 and 4 of Exhibit XXII-A). The *Inam* Commissioner was asked by the Government to report upon this letter. The Commissioner made a report to the Government on the 17th October 1872, which report is found in page 58 of the documents. In paragraph 2 of that report he says "In 1822 (the last time when any question about them was raised it was decided by Government that the *mutwalli* was entirely dependent upon the Nawab's favour and approval, and now, as would appear clear from enclosure Exhibit EE (a document of 1863), it has been further determined that the superintendence of all mosques and tombs in this Presidency connected with the Carnatic family shall be entrusted to His Highness the Prince Azum Jan Bahadur and his successors-in-title ... ... I have the honour to recommend that I may be authorised to cancel the existing title-deeds and to issue new ones as prayed for by His Highness." On this report of the *inam* Commissioner, the Governor-in-Council directed that the title-deeds may be issued in the name of the *mutwalli* for the time being of the Wallajah and Anwari *Musjids* by nomination of His Highness the Prince of Arcot and they further stated that by this means, the intention of His Highness will be effected and the endowments will follow the nomination of the Prince of Arcot for the time being. In effect, the Government said that the title-deeds need not be issued directly in the name of His Highness as requested by His Highness, but the result desired by His Highness and recommended by the *Inam* Commissioner may be brought about as effectively, though somewhat indirectly, by issuing the *inam sannads* in the name of the *mutwalli* for the time being by nomination of His Highness. So that, whomsoever His Highness nominates from time to time at his full discretion will be registered as the *jagirdar* from time to time. I agree respectfully with the learned trial Judge that the appointment from time to time of the *mutwalli* was vested in the Nawab of Arcot (later the Prince of Arcot) for the time being and that the *mutwalli* for the time being had no power himself to appoint his successor. The matter is cleared by the contents of the petitions made by the *mutwallis* to the head of the House of Arcot for the grant of the office of *mutwalli* and of the *sannads* granted in accordance with such petitions (one of the alleged petitions, Exhibit 23, seems to be inadmissible in evidence as not proved to be a correct copy and I shall ignore it). The *sannads* [Exhibit XXVI and 46 (*a*)] granted to the plaintiff's grandfather state that he should do his duty of *mutwalli* in obedience and submission to the Prince of Arcot and his successors and that the submission and obedience to the Prince of Arcot and his successors is the cause of the permanency of the office. I, therefore, agree with the trial Judge that the appointment to the vacancy of the office of *mutwalli* rests absolutely with the Prince of Arcot and not with the *mutwalli*

for the time being. The original *sannad* of 1792 appointing the plaintiff's great-great-grandfather has not been produced by the plaintiff and what the terms of that appointment were cannot be found out directly.

In *Rahumutulla Sahib* v. *Mahomed Akbar Sahib* (3), it was held that the determination of the question of succession to an office in a mosque endowment depended not on the general law of property, but upon the rules which the founder of the endowment established, whether such rules were defined by writing or were to be inferred from evidence of usage and that the Will of the founder could be so ascertained from the usage of former days. I think that in the present case, there can be no doubt from the documentary evidence already set out (see also Exhibit XII, dated 1816, and the other documents referred to by the learned trial Judge) that the appointment of *mutwalli* is vested in the head of the House of Arcot for the time being and does not depend in any degree upon the Will of the previous *mutwalli*. Hereditary tenure and tenure by appointment of the previous *mutwalli* were set up in previous litigations by the plaintiff's predecessors and were given up (See Exhibits 34 to 37 and 45 and 46 series).

The next questions to be decided in this case are (*a*) who has the right to remove the *mutwalli*? (*b*) If the Prince of Arcot has that power, has His Highness the absolute right to remove at his discretion or has he the right to remove only for certain defined causes and if so, for what causes? (*c*) Whether the plaintiff has been removed for proper causes?

I might state shortly that the documentary evidence in the case from Exhibit 12, dated 1816, downwards leaves little doubt that the head of the House of Arcot asserted all along the absolute right to deal with the office of *mutwalli* in these mosques and that that right was recognised from 1822 by the Madras Government. In Exhibit XII, the Nawab said: "The office of superintendent is not confined to the same person who is liable to be removed and succeeded by another, the appointment of whom rests invariably with the choice of His Highness." In Exhibit XIII, dated 1824, the Nawab recites that he conferred the appointment on plaintiff's great-grandfather as per his petition of July 1822 and that the appointee should file the accounts of his receipts and disbursements in the Nawab's Sircar office. The title-deeds, Exhibits 24 and 25, issued to the plaintiff's grandfather in 1812 inform the *mutwalli* plainly that he holds that office under the orders of His Highness the Prince of Arcot for the time being. When the litigations of 1883 and 1884 were concluded by the *razinamahs* of 1888 [See Exhibits 23 and 45 (a)], the power of dismissal was recognised to be in the hands of the Prince of Arcot. It is admitted that these endowments are not governed by the provisions of the Religious Endowments Act of 1863 and that we must resort to the terms of the original grant or to the Muhammadan Law to ascertain who has the power to dismiss the *mutwalli*. The terms of the original grant are not before us, but the usage so far as could be gathered, from the declarations made before disputes arose and from acknowledgments of the plaintiff's two immediate predecessors in the office, is proved to be that the head of the House of Arcot has the power to dismiss the *mutwalli*. The Muhammadan Law allows to a *waqif* the right to reserve to himself the power of removing the *mutwalli* as stated by Mr. Syed Ameer Ali at page 447 of Volume I of his Muhammadan Law. That this right of removal could be reserved by the *waqifs* to the *waqif's* descendants seems also to follow from the principles gatherable from the texts. The *waqif* can himself be the first *mutwalli* and in fact, is the most appropriate *mutwalli* and his executor will become the next *mutwalli* in the natural course even without appointment by the *waqif*. Now a *mutwalli* is stated to be merely an agent on behalf of the *waqif* (see page 462 of Mr. Syed Ameer Ali's Muhammadan Law) and his agency terminates on the death of the *waqif* unless he has been appointed for the *waqif's* life and after his death. Ordinarily, under the Muhammadan Law, the power of removal of the *mutwalli* is vested in the *Kazi* (now, in the Courts), but, as I said, if under the original scheme settled by the *waqif*, he reserved to himself and his heirs the power of removing the *mutwalli* and of making nominations from time to time, I do not think that the exercise of such a power would be illegal under the Muhammadan Law, provided it is not exercised

(3) (1874-75) 8 Mad. H. C. R. 63.

to the detriment of the interests of the mosque. If the *mutwalli* comes in only as the agent of the *waqif*, an agent's power can be put an end to at any time and the principal can himself take up the management. In all these matters, however, the primary consideration is the interest of the religious endowment and though the *waqif* is superior to anybody else (see page 763), even he could be removed from the post of *mutwalli* in the interests of the endowment, that is, for manifest breaches of trust or misfeasances or incapacity to discharge the duties of the office as well as immorality, even if the *waqif* has made a condition to the effect that in the case of breach of trust on his part either the *Kazi* or the Sultan shall not have the power of removing him. In the present case, can we say that the reservation by the head of the House of Arcot (as proved by the evidence of usage) in himself and his successors of the power to remove the *mutwalli* is detrimental to the interests of the institution? On the other hand in the circumstances of these particular institutions connected closely with the House of Arcot, the existence of such a power seems to me to be in the best interests of the institutions.

I must, however, admit that on this subject of the power of removing the *mutwalli*, I have felt considerable difficulty in coming to a conclusion satisfactory to my mind. So far as the power of removing the first *mutwalli* is concerned, the *waqif* and his executor's power seems to be clear. But whether that power can be lawfully reserved to remoter successors in the life of the *waqif* was not so very clear to my mind. But after the best consideration I could give to the question, I think the reservation of such a power, if it is not manifestly against the interests of the endowment, may be upheld. In the case in *Khajeh Salimulla* v. *Abdul Khayer Mohammad Mustafa* (4), Mookerjee and Vincent, JJ., quoted many of the original texts on this branch of the law. One dictum of the Jurists seems to be that "any condition imposed by the founder of the *waqif* is like an express text of the law-giver." And when such a condition is proved by long usage and is not against the interests of the institution, I do not see why it should not be respected like an express text of the law-giver. On the question (*a*) therefore, which I formulated, I hold that the head of the House of Arcot for the time being has the power to dismiss the *mutwalli* for the time being. I might here say a few words on the question of the management itself as that question has some bearing on the consideration of the point whether the power of dismissal can, properly in the interests of the institution, be vested in the head of the House of Arcot. In the first place, it is to be remembered that though the title-deeds of these *jagirs* were issued from time to time in the names of the nominees of the Prince of Arcot, the title-deeds of the two mosques themselves and of the shops, lands, gardens of the mosque (an income of about Rs. 60 a year to be spent upon the improvement of the mosque buildings, etc., being derived from the rents of these shops, sites and gardens) have always been issued in the names of the heads of the House of Arcot themselves, (See Exhibits 20, 21, etc.)

Again though a person called *mutwalli* has been appointed from time to time, his powers have always been very much less than that of an ordinary *mutwalli*. The head of the House of Arcot retained most of the powers of superintendence and management and in fact the head of the House treated himself as the principal *mulwalli* and treated the officer called *mutwalli* as a sort of delegated agent under himself. In the *sannad* appointing the plaintiff's great-great-grandfather (Exhibit 13) the *mutwalli* was required to file accounts in the office of the Nawab. In the *sannad* (Exhibit III, dated 1894) the Nawab directs the *mutwalli* to obey and submit to himself, his successors and his *naibs* or deputies and the *mutwalli* is directed to register a Power-of-Attorney in the name of any person whom the Prince of Arcot shall appoint for working and collecting the incomes from the *mouza* (village) of Ismail Kuppam. That is, the *mutwalli* is not even to collect the income of the village of Ismail Kuppam, but is bound to grant a Power-of-Attorney to the Prince's nominee, and that nominee was to collect and pay the collections into the Nawab's treasury. It is further said that as regards the shops, etc., and the land round the mosque, he should not do anything without the permission of the Prince

(4) (1909) 37 Cal. 263=3 I. C. 419.

of Arcot and his *naibs* or deputies : "You should always pay in all the income from shops and land aforesaid into the office for *intizam* (management) and *ihthimam* (superintendence) of the mosques connected with our *sirkar*, which is located at Amir Mahal, and defray the expenses for both the mosques aforesaid, distribute the salaries of the servants there and execute repairs to shops, etc., with the money which will be paid out from our office when needed as per accounts." Thus except the income of Shayanavaram *jagir* which was the salary of his office, the *mutwalli* had no right even to handle directly the other incomes connected with the maintenance of the mosques and their lighting charges and he was merely a sort of sub-agent acting under the *naibs* or deputies appointed by the Prince of Arcot. The documentary evidence leaves little doubt that though the plaintiff's ancestors were given the sonorous title of *mutwalli* by the Princes of Arcot, the actual superintendence was retained in the House of Arcot itself, the *mutwalli* being treated as an agent in the matter of distribution of some salaries, etc., connected with the mosques. By the *razinamah*, Exhibit 34, dated 1888, the plaintiff's grandfather agreed that all rent bills in respect of the said charity properties shall be made out in the name of the 1st defendant, His Highness the Prince of Arcot, but the same shall be signed by the plaintiff as such *mutwalli* or by the *naibs* duly authorized on that behalf for and on behalf of the said *mutwalli*, that the plaintiff shall not be at liberty to dismiss the said *naibs* without the consent of the Ist defendant, His Highness the Prince of Arcot, and that the plaintiff shall himself bear the expenses of the employment of the said *naibs* out of his income from the Towbath Jaghire of Shayanavaram. The only tangible power given to him was the power to fine and suspend all servants employed in the mosque for any misconduct, negligence or dereliction of duty. He cannot, however, even appoint or dismiss such servants without the consent of the Prince of Arcot previously obtained (See paragraph 4 of Exhibit 34). The vesting of the power of dismissal of such a nominal *mutwalli* in the Prince of Arcot who was the real *mutwalli* cannot be said to be detrimental to the interests of the mosque.

Coming to the question (*b*), the documentary evidence clearly leads to the conclusion that till the date of the *razinamah* (Exhibit 34) the Prince of Arcot claimed and had the power of dismissal of the *mutwalli*. This power was impliedly, if not expressly, acknowledged by the *mutwalli* and was recognised by the Government of Madras. In these *razinamahs* [Exhibits 34 and 45 (*a*)], however, the Prince agreed that the then *mutwalli* should be liable to dismissal from office in case of wilful disobedience of legal orders or gross misconduct and in such circumstances where his dismissal would be warranted or sanctioned by Muhammadan Law [though the word before the phrase 'in such circumstances' in Exhibit 34 is 'and' and not 'or,' the context and the terms of Exhibit 45 (*a*) show that "and" is a mistake for 'or']. Thus, the Prince of Arcot, so far as the plaintiff's grandfather was concerned, restricted his own unfettered powers of removal of that particular *mutwalli* and agreed that he personally can be removed only for wilful disobedience of legal orders, etc. I am not at all sure that the Prince of Arcot gave up his usual absolute right to remove the *mutwalli* after the plaintiff's grandfather's death and to curtail his powers of dismissal to the case of wilful disobedience of lawful orders etc., or gross misconduct in the case of the plaintiff's father. I do not see anything in the *sannads* of appointment granted to the plaintiff and to the plaintiff's father (Exhibits 3 and 2 respectively) which restricts the said absolute discretion of the Prince of Arcot. In Exhibit 41 the plaintiff's father admitted that he held the *mutwalli* office "at the pleasure and under the orders of the founder of the endowment, His Highness the Prince of Arcot, and that he cannot even grant a lease of the land belonging to the mosque for a term of even five years." The plaintiff in the agreement (Exhibit A) signed by him agreed to obey His Highness the Prince of Arcot in all matters in every way. I might here state that in 1890 [See Exhibit 49 (*a*)] the Government recognised the Prince's power to nominate anybody at any time and to terminate the appointment of one nominee, whenever the Prince desired, by making another nomination. I do not say that the order or the opinion of the

Government is binding upon this Court except as regards the right to receive the *jagir* incomes, but it shows that the Prince of Arcot has always asserted his right and his right was accepted by every body including the Government and the plaintiff's ancestors, except during the period of the litigation between the plaintiff's grandfather and the then Prince of Arcot which ended in the Prince's restricting his powers of dismissal as regards the plaintiff's grandfather personally. My conclusion, therefore, is that so far as the plaintiff is concerned, the Prince of Arcot had the absolute power to dismiss him from the office.

Supposing that I am wrong in this view and that the Prince of Arcot can dismiss the plaintiff only on one of the grounds mentioned in the *razinamah* (Exhibit 34), I agree with the learned trial Judge that the plaintiff was guilty of gross misconduct and wilful disobedience of legal orders. It is clear from the evidence that the plaintiff did not allow the Prince's nominee (to whom the plaintiff had given a Power-of-Attorney) to collect the rents of the shops attached to the mosques from June 1912, that the plaintiff did not submit accounts of his collections from about May 1912, that from July 1912 he collected the income of Ismail Kuppam also preventing the Prince's nominee from collecting such income and that his conduct was continuously contumacious towards the Prince for about four months till he was dismissed in September 1912 (Exhibit G). The Muhammadan Law says that a *mutwalli* can be removed for incompetence and the removal from office of the plaintiff, who was a minor till after this suit was brought, who says in his evidence that he did not keep any accounts and who tried to make himself a sort of idiot in the evidence according to the learned trial Judge, was, in my opinion, not improper. Admittedly the plaintiff did not send accounts from May 1912. In his evidence he was asked "why did you not send the accounts?" His answer was "They were not sent." He was again asked "you cannot give any explanation." His answer was "I cannot." It is also clear from the plaint in this suit and from the lawyer's notice, Exhibit D, sent by him in July 1912, that he meant to defy the authority of the Prince of Arcot. While I do not think that the letter (Exhibit 43) written by the plaintiff in July 1912 is so very disrespectful or impertinent as the learned trial Judge seems to have considered it to be (on the other hand I am disposed to think that there is no want of respect at all in the terms of the letter), I think that the conduct of the plaintiff in dismissing the Prince's deputy in breach of the conditions of the plaintiff's appointment and in patent defiance of the Prince, his deliberate omission to submit accounts and the other circumstances mentioned by the learned trial Judge justify the dismissal of the plaintiff, especially as, in my opinion, he was not a *mutwalli* in the full sense of the term but was a sort of special agent of the real superintendent, the Prince of Arcot.

Lastly, I must notice one point which is relied on by each side as in its favour. The plaintiff contended that the agreement, Exhibit A, in which he practically acknowledged the Prince of Arcot to be the real *mutwalli* and himself to be a nominal *mutwalli* with very restricted powers, is not binding upon him because he was a minor when he executed it. It is unnecessary for me to give a final opinion on this question as I have held, apart from the agreement, that the Prince had full powers of appointment and dismissal. On the other side the Prince of Arcot (the 1st defendant) relied upon the plaintiff's minority in support of his contention that the appointment itself of the plaintiff was invalid because a minor cannot be appointed as *mutwalli* under the Muhammadan Law. The reply of the plaintiff to this contention was that though he was a minor under the Indian Majority Act, he was a major under the Muhammadan Law and the Indian Majority Act would not affect the religion or religious rites or usages of any class. (S. 2, clause (*b*) of the Indian Majority Act). I was at first inclined to think that as the office of *mutwalli* can be held by a woman or even by a non-Moslem, the age of majority for the holding of such an office is not a question connected with the religion or religious rites and usages of the Mussalmans and hence the age of majority for the holding of such an office should be 18. But it appears from the evidence of the defence first witness himself that there are some religious duties connected with the office of *mut-*

walli in these mosques and I am not, therefore, free from doubt on this point.

I might in conclusion add that as regards the right of the plaintiff to receive the Government Revenue granted as *jagir* to nominees of His Highness the Prince of Arcot, the Government's orders are conclusive in respect of the said right and without a certificate from the proper officer of Government a Civil Court cannot take cognisance of the claim relating to the said land revenue grants. (See Ss. 4 and 6 of the Pensions Act, XXIII of 1871.)

In the result I would dismiss the appeal with costs.

Napier, J.—This appeal arises out of a suit brought by one Mahomed Kadir Mohideen Sahib Maghirbi (by his next friend) against the Prince of Arcot and one Mahomed Abdur Raheman Sahib, sued as an attendant on the Ist defendant, for a declaration that the plaintiff is the lawful *mutwalli* of the plaint mosques and of the endowments attached thereto and is entitled to collect the rents and profits of the plaint properties and to manage the mosques and that the alleged appointment of the 2nd defendant as *mutwalli* is *ultra vires* and for an injunction to restrain them from both collecting the rents and profits of the plaint properties or in any way interfering with the management of the plaint mosques.

The basis of the plaintiff's claim is that he succeeded to the office of *mutwalli* on the 28th December 1911 in accordance with the Will of his father, the previous *mutwalli*, dated the 16th November 1911. He further contended that the 1st defendant had no power to remove the plaintiff from the office, that being hereditary in the plaintiff's family. He admitted that he had signed an agreement on the 28th December 1911, and a Power-of Attorney dated 20th January 1912, limiting hispowers, but alleged that as he was a minor at that time these documents were not binding on him and further that they were obtained by fraud and undue influence of the 1st defendant. Issues were framed on these allegations and a further issue, whether the 1st defendant was entitled on the terms of the agreement to remove the plaintiff from the office, was also framed.

Two of the allegations in the plaint are contradictory; for if, as strenuously argued in appeal, a *mutwalli* has the right to appoint his successor, it is obvious that the office cannot be hereditary; but for reasons which will be given later I do not propose to deal with that question. The basis of the plaintiff's claim is that the office of *mutwalli* is a *waqif*, that it is created by a document called a *parwanah*, that although a *waqif* has power to reserve to himself and his descendants the right to appoint and dismiss and to impose conditions, the original *parwanah* under which the first *mutwalli* was appointed contained no such limitations and that, therefore, he cannot be disturbed in his possession of the office. He puts forward three documents, Exhibits U, W and Y, as the original *parwanahs* and points to the absence of any conditions in them and contends that any variation of these *parwanahs* is *ultra vires* and not binding on him. This argument is based on an entire misconception of the nature of the documents Exhibits U, W and Y. Their true nature appears from an examination of the history of this office and its endowments. It has been elaborately examined by the Chief Justice, then Mr. Justice Wallis, who tried this case *vide* his judgment pages 21 to 30 of the printed record. The office must have been created about the year 1792, because the Wallajah Mosque was not built till then. At that time the Nawab of Carnatic created the office, appointed the *mutwalli* and endowed the mosque. The documents Exhibits U, W and Y are not *parwanahs* appointing the *mutwalli*, but are at the highest, assignments of revenue for the endorsement of the office. I say at the highest. because it may be that there were other formal *inam*-deeds addressed to the *mutwalli*. These documents are *takeeds* or orders issued to the revenue officials. The first document, Exhibit U, directs the payment of the *youmia* (allowance) to the *mutwalli* and is dated 1792. Exhibit W (1797) is another direction to the revenue officers to leave the whole of the *mouza* of Ismail Kuppam in the possession of the *mutwalli* so that he might apply the income thereof towards the expenditure of the said mosque; while Exhibit Y (dated 26th November 1798) is a similar direction with regard to the *mouza* of Shayanavaram to be left in possession of the *mutwalli*, so that he might use the income thereof towards his maintenance and

"engage himself in performing the duties of the *mutwalli*." It is possible that these are the only documents assigning the revenue, for Mr. Devadoss has invited our attention to documents of a similar nature in Atkinson's Treatise which were treated as the title-deeds to certain *jagirs*. The fallacy of the argument lies, however, in supposing that there are the deeds of appointment of *mutwalli*. They are nothing of the sort. It is not to be expected that the conditions on which the *mutwalli*, held his office would be found in these directions to the revenue officials, who are simply concerned with the proper disposal of the revenues accruing from their charge. The evidence to be referred to later shows clearly what the form of the *parwanah* was.

But perusing the history of the endowment the next stage is after the treaty of 1801, under which the sovereignty of the Carnatic passed to the Crown. Exhibit 9 is an order passed by Government on the 3rd April 1802 to the Collector, stating that the Governor-in-Council having resolved to restore the lands with which the mosque was endowed directs the Collector "to restore to the servants of His Highness the Nawab the villages of Ismail Kuppam and Shayanavaram." This document indicates two things; (1) that Government had resumed the *inams*; (2) that Government decided to restore them. Of the right of Government to resume there cannot be a shadow of doubt. First it was an assignment of the public revenues and it is sufficient to say that the whole work of the *Inam* Commissioner in the middle of the last century consisted of deciding what assignments of public revenues and public lands were to be continued and what were to be resumed. Further there is the decision of the Privy Council in the well-known case of *East India Co.* v. *Syed Ally* (2) that a resumption by the Madras Government of a *jagir* granted by former Nawabs before the date of the treaty and a regrant by the Madras Government to another for the life-estate only was such an act of sovereign power by the East India Company as precluded the Supreme Court of Madras from taking cognizance of a suit by the heirs of the alleged grantee in respect of such resumption. That was a still stronger case for the grantee because the grant was one of lands and villages, not of revenue. The right is undoubted and I only refer to the case because the learned counsel for the appellant did not appear to appreciate the distinction between a grant of an *inam* of revenue from a Government order which might or might not be *ultra vires*. It is to be noted that the form of this *inam* approximates closely to that of Exhibits W and Y, in that it is a direction to the revenue officials and not a title-deed issued to the grantee. Exhibit 10 is a document in the same form drawn up in 1804, granting the *jagir* of Shyanavaram to the then *mutwalli*, though not named as such, for life subject to certain Police duties. It is dated 1804, but nothing evidently was done on this document until 1816 when the Collector endeavoured to enforce it. The Nawab instantly wrote Exhibit 12 on the 11th October 1816 to the Government agent inviting the attention of Government to this, stating that the office of *mutwalli* was not confined to the same person but that he was liable to be removed and succeeded by another, the appointment of whom rested invariably with His Highness; and asks that the villages should be allowed to remain as usual under His Highness's authority. Six years later the Nawab wrote again stating that the *mutwalli* had died and forwarded a copy of his letter, Exhibit 12, asking that the two villages should continue as usual for the maintenance of the mosques and the maintenance of the *mutwalli*, the letters being Exhibits 14 and 16. In reply he was informed (Exhibit 17) that the Collector had been instructed to enter the two villages in his *inam* register as an endowment for the mosques to be administered by the then incumbent "so long as he shall retain the situation of the *mutwalli* of the said mosques under the orders of His Highness the Nawab of Carnatic." Exhibit 18 is the order of Government to the Collector in the same words. This order operates as a cancellation of Exhibit 10 and a definition of the terms under which the servants of His Highness were to hold the *inam* granted by the Government under Exhibit 9. The right of Government to do this cannot be disputed. Fifty years later in the year 1872, the Prince of Arcot again raised the question of the form of the *inam* and asked that it should be varied by inserting his own name as *inamdar*

in the place of the *mutwalli*, on the ground that the affairs of the mosque were being conducted in a very unsatisfactory manner (Exhibit 22 A). The *Inam* Commissioner in dealing with the application pointed out that in 1822 it had been decided by the Government that the *mutwalli* was entirely dependent on the Nawab's favour and approval, and recommended the issue of a *sannad* in the form asked for, *vide* Exhibit 22. But the Government, by general order, dated 25th October 1872, decided not to issue the *sannad* in the name of the Prince of Arcot, but recognising the force of the Prince's objections to the form cancelled the old *sannads* and ordered their re-issue in another form stating that "by this means the intention of His Highness will be effected and the endowments will follow the nomination of the Prince of Arcot for the time being."

Exhibits 24 and 25 are the new *inam* title-deeds. They are in the usual form of religious service *inam* of Government revenue and contain the paragraph: "This *inam* is conferred on you and your successors tax free to be held without interference as long as the conditions of the grant are duly fulfilled." They are stated to be "granted to the *mutwalli* for the time being" of the mosques "by nomination of His Highness the Prince of Arcot." These title-deeds were sent not to the *mutwalli*, but to the Prince of Arcot and were delivered to the then *mutwalli* with an endorsement by the Prince which runs as follows: "This title-deed is delivered to Khitabuth Khan to be retained by him as long as he holds the service of the *mutwalli* of the Anwari and Wallajah Mosques under the orders of his Highness the Prince of Arcot for the time being." These are the *inam* title-deeds under which the *mutwalli* draws the Government Revenue of those two villages for the maintenance of the mosques and for his own support. For the reasons given above it is clear that the Government had the right to vary the terms of this *inam* from time to time as it thought fit and that no one but the *mutwalli* for the time being nominated by the Prince of Arcot could draw the revenues. This being the history of the *inam*, it is clear that the grants were always silent as to any conditions which the Prince of Arcot attached to the nomination, but they certainly indicate that the appointment was at his entire discretion. This view is supported by reference to an entirely different class of documents. These are the *parwanahs*; and it is the appellant's case that the *parwanahs* were nothing but formal approval by the Nawab of an appointment which was either hereditary or testamentary—the appellant not being clear as to which of these two positions he would take up.

It has been pointed above that Exhibits U and W and Y are not *parwanahs*. We have, therefore, to ascertain from the *parwanahs* that have been exhibited and from the usage during the hundred years of the existence what those conditions were of this office. Now, the first thing to be borne in mind is that this is not a *waqif* created by a private person but is one created by the Sovereign; and it is in the highest degree improbable that the Sovereign, in appointing to an office of a mosque which was admittedly his own property and the title to which has been confined to him personally by Government on two occasions (by Exhibits 11 and 20), should have deprived himself of the power to keep the office under his own control. That any Court of law during the continuance of that sovereignty would venture to question any act of His Highness is a suggestion to my mind quite out of the question. But I agree that since the reduction of the Sovereign to the status of a private person it is open to the Courts of this country to enquire into the conditions and adjudicate on them.

The first *parwanah* filed is Exhibit 13, dated 8th May 1824. It states that the office was conferred upon the then holder as per petition signed by him and requires him to utilise the income for the mosques and repairs and to file accounts in the office of the *sircar*. This is with reference to the *mouza* of Ismail Kuppam. Exhibit 19, likewise issued on a petition, directs him to utilise the income of the *mouza* of Shayanavaram for his maintenance and to perform the duties of *mutwalli* for the mosques. The petition has not been produced. The next *parwanahs* are of the year 1872, Exhibits 26 and 46 (*a*). Then again the office of *mutwalli* is conferred on a petition from the applicant; he is required to do his duties in adherence to the commandments of the law of Islam and "in obedience to and sub-

mission to us and to our successors." Exhibit 23 purports to be a copy of the petition to the Prince, but we have held it to be inadmissible. The nature of the petition, however, is apparent from the following fact. These *parwanahs* were granted on the 29th November 1872. Exhibits 24 and 25 above referred to are the *inam* title-deeds, dated 2nd November 1872, which were sent to the Prince. They bear endorsement of the 29th November as follows: "This title-deed is delivered to Kitabuth Khan to be retained by him as long as he holds the service of *mutwalli* of the Anwari and Wallajah Mosques under the orders of His Highness the Prince of Arcot for the time being." There can be no doubt, therefore, that Kitabuth Khan petitioned the Prince for the appointment and undertook to obey his orders, recognising the right of His Highness to nominate him and his own right only to hold the office as nominee for the time being. The next is Exhibit 47 which is dated 17th December 1888. This contains an additional clause that the *mutwalli* should pay the income of the *mouza* of Ismail Kuppam into the office of the superintendent of the mosques. It recites a petition of the 2nd August 1888 and the *razinamah* in a suit, dated 16th October 1888. It also recites that Kitabuth Khan had been suspended and that in consequence of the petition and the *razinamah* he was again allowed to remain, as he was, undisturbed subject to his being faithful to the conditions and terms mentioned in the petition and the *razinamah*. The petition is not produced but the *razinamah* is Exhibit 34. It is full of onerous conditions and paragraphs 11 and 12 recognise his right to the office as long as he would duly and faithfully perform the duties and is not guilty of wilful disobedience of legal orders or gross misconduct, and his liability to dismissal in case of wilful disobedience of legal orders or gross misconduct. The last *parwanahs* are Exhibits 2 and 3 under which the plaintiff was appointed. They appoint him as *mutwalli* as long as he performs the duty with perfect straightforwardness "carrying out our orders and those of our successors." They require him to deliver the collections of the income of the village of Ismail Kuppam to the office and to draw the amount required for the salaries from the office, and like all the others are given on the conditions recorded in the applicant's petition; they further purport to be on conditions of his abiding himself by the agreement of the 15th June 1894 and make a special provision under which he is to give a Power-of-Attorney to the person, this latter provision being due to his extreme youth. The agreement is Exhibit A of the 28th December 1911. The petition, Exhibit L, is dated 27th December 1911. In the latter he applies for the *parwanah* after giving an agreement and undertaking to obey the "illustrious royal persons." The agreement contains all the conditions referred to above together with several others.

Now, what is the inference to be drawn from these documents? The original *parwanahs* of 1792 are not produced. The later *parwanahs* contain conditions limiting the rights of the *mutwalli*, conditions which become more detailed in each successive *parwanah*. These *parwanahs* are all granted on petitions and the later ones are specifically stated to be on terms of agreement. An effort was made between the years 1881—1888 by the *mutwalli* to assert the right, which is put forward here, by a suit in the High Court. That suit was compromised on the terms that appear in the *razinamah* decree and amount to a complete submission to the Prince of Arcot. The Prince has invariably claimed in correspondence with the Government, that the office is subject to his disposal. Mr. Chamier has argued that those letters were written behind the back of the *mutwalli* and could not, therefore, be used against him. If there was nothing but these letters, that argument would have considerable force. But seeing that every *mutwalli* has accepted the position claimed by the Prince, I can only arrive at one conclusion, namely, that by the original *purwanah*, which has not been produced, the Nawab reserved to himself an absolute right of appointment and dismissal—a right which would be in entire accordance with his position as a Sovereign Prince.

I do not think it necessary to go into the evidence as to breach of the conditions of service. But I entirely agree with the learned Judge who tried the case that there has been a breach. I was at one time inclined to think that the breach

was not wilful. But on further examination of the evidence as to what occurred and bearing in mind the attempt by the predecessor of the plaintiff to establish his right to do the very thing which the plaintiff has done and also the attitude taken up by the plaintiff through his Vakil before the suit and the claim put forward in the plaint, I have no doubt that his action was due to a desire to assert his right which he claims in the suit. For the above reasons I am of opinion that the appeal fails and must be dismissed with costs. In this view of the case, I think it unnecessary to express any opinion on the many other questions raised during the argument, namely, the limitations that can be attached to a *mutwalli's* office under the Muhammadan Law; the nature of succession where it is not provided for by the *waqifnamah*; the effect of the plaintiff's minority and his position if he was not nominated, and last the effect of the Pensions Act on the suit. These questions would require among other matters a very careful examination of the provisions of the Muhammadan Law which I do not find it necessary to make for the disposal of this case.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 127

SPENCER AND SESHAGIRI AIYAR, JJ.

Nanu Nair and *others*—Defendants—Appellants.

v.

Kantan Ashta Moorthi Nambudripad and *others*—Plaintiffs—Respondents.

Second Appeal No. 1042 of 1913, decided on 9th February 1915, against the decree of Sub-Judge, Coimbatore, in A. S. No. 649 of 1909.

(a) Civil P. C. (5 of 1908), S. 105 (2)—Scope and object of clause 2 stated—Test of application of Cl. 2 stated.

S. 105, clause (2), Civil Procedure Code, only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order, but whether the party has availed himself of the appropriate remedy of appealing against the order. [P. 128, C. 1.]

(b) Evidence Act (1 of 1872), S. 105—Demise on *Kanom* to defendants disputed—Plaintiffs holding under divisee—Very little proof of lease in favour of Plaintiff is required to shift burden of proof on defendant—Quantum of evidence required of mortgage where mortgagee's possession is admitted is smaller than when title of plaintiff is denied and possession of mortgagee is also denied.

Where the question is as to whether certain property had been demised on *kanom* to the defendants' predecessors-in-title, and the property is conceded to have belonged originally to certain persons, others being recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice to shift the burden of proving title to the defendants. 27 Bom. 271, Foll. [P. 129, C. 1.]

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where the title is denied and possession is not shown to have been under the owners. (18 Mad. 462; 13 Mad. L. J. 274; 17 Mad L. J. 122, distinguished.) [P. 129, C. 1.]

(c) Evidence Act (1 of 1872), S. 90—S. 90 is applicable to copies also.

The presumption contained in S. 90, Indian Evidence Act applies not only to original documents, but also to copies thereof. 22 All. 294, Foll. [P. 129, C. 2.]

(d) Interest—Rate—Rate should be 6 p. c. on delayed claim for rent—Interest should not be allowed in absence of contract or demand.

The rate of interest allowable on a stale claim for arrears of rent is only 6 per cent. A. I. R. 1914 Mad. 661, Foll. [P. 130, C. 1.]

In the absence of any specific contract to pay interest, or even a period fixed for payment, and in the absence of any demand for the same; no interest is claimable on arrears of rent. 26 All. 299 (P. C.); 20 Mad. 481; 26 Cal. 955. Foll. [P. 130, C. 1.]

(e) Transfer of Property Act (4 of 1882)—Mortgagee in possession is liable to pay enhanced revenue.

It is the mortgagee in possession and not the mortgagor that is liable to pay the enhanced Government revenue. A. I. R. 1915 Mad. 100, Foll. [P. 130, C. 1.]

Ananthkrishna Aiyar—for Appellants.

Nilakanta Aiyar—for Respondents.

Judgment.—The plaintiff's case is that the properties in suit belong to his *mana* in *jenmi*, that they were demised by two *kanom*-deeds in the year 1840 to two ladies, who were members of the defendants' *tarwad*, and that the defendants have denied his *jenmi* title. He sues to recover possession and *michavaram* on payment of the *kanom* amount. The defendants pleaded that the properties did not belong to the plaintiff's *mana* and alleged that they were their *tarwad* properties. They also denied the demises sued on.

The District Munsif held that the demises were not proved and dismissed the suit. On appeal, the Subordinate Judge came to the

conclusion that "the demises sued upon were true and that the plaint lands were held under them." He reversed the decree of the District Munsif and remanded the suit.

An appeal was preferred to the High Court against this order of remand. The learned Judges who heard it pointed out that as the District Munsif did not dispose of the suit on a preliminary point, the order of remand was wrong. They set aside that order and directed the Sub-Judge to re-hear the appeal after calling for findings on the other issues raised in the case.

Findings were submitted and on their receipt, the Subordinate Judge held that the properties belonged in *jenmi* to the plaintiff's *mana* and decreed possession. He also passed a decree for the payment of the *poruppu* and for the value of improvements. This second appeal is against that decree.

Mr. Ananthkrishna Aiyar stated frankly at the outset that he was not prepared to contest the finding that the properties originally belonged to the plaintiff's *mana*. He contended that there is no legal evidence to support the demises sued on.

Before dealing with the points argued by the learned Vakil, it is necessary to dispose of a preliminary objection raised by Mr. Nilakanta Aiyar on behalf of the respondents, that it is not competent to the appellant to object to the finding that the demises were legally proved. His contention is that as the Subordinate Judge in his order of remand found distinctly in favour of the demises, and as that finding was not reversed by the High Court in the appeal against his order, the question should not be re-opened. This argument proceeds on a misconception of the provisions of S. 105; clause (2) prevents a party from agitating in the appeal against the decree a question which he could have objected to in the appeal against the order. The test is, not whether a decision has been given upon the points raised in the civil miscellaneous appeal, but whether the party availed himself of the appropriate remedy of appealing against the order. In the present case there was an appeal against the order of remand and that order was reversed. It is difficult to see how the appellant could have compelled the Court to express an opinion on a subsidiary point when the order itself was vacated. The right view is to hold that the decision on the question of the demises was not given in the order which has been set aside, but in the final judgment which superseded it. The preliminary objection must be overruled.

The main point for consideration is, whether there is legal evidence on which the Sub-Judge could have based his decision in favour of the demises sued on. Mr. Anantakrishna Aiyar contended that Exhibit A has not been properly proved and that there is no other evidence, oral or documentary, which would justify the finding of the lower Appellate Court. Before dealing with Exhibit A, it is desirable to consider whether there is other evidence on which the conclusion of the Sub-Judge can be upheld. Exhibit E is an account of the property given as security by one Sankaran Nair, who admittedly was a member of the defendants' *tarwad*. In the bond he executed "property sowing 80 *paras* of paddy and situated in Netumballam" is described as the *jenmi* of the Kuruvayur *Mana*. Sankaran Nair is described as the *kanomdar*. It is not alleged that the plaintiff's *mana* had any other property in Nettumballam. The amount of the *kanom* is also given. The note appended to the document shows that the *kanom* document was produced before the head *gumastah* of the *Taluq* Office. Then we have Exhibits C and D which are extracts from the Stamp Register Book, showing that two stamp papers for writing *kanom*-deeds relating to lands sowing 40 *paras* of paddy each were purchased in *Meenam* 1015 (corresponding to 1840). They were sold to Kuruvayur Manakkal Nambudripad, the predecessor-in-title to the plaintiff. The District Munsif who decided the point against the plaintiff did not impugn the genuineness of these documents. The description in these documents of the ladies to whom the demises were executed as belonging to Thottanchath led him to hold that the defendants' *tarwad* was not the demisee. The Subordinate Judge, on a careful examination of the evidence, has come to the conclusion that the *tarwad* was known by the names of Kuruvakkat and Thottanchath indiscriminately. In this view, he is justified in holding that the reference in Exhibits C, D and E was to the defendants' *tarwad*. There is also Exhibit C, the evidence of one of the plaintiff's witnesses taken on commission, to support the plaintiff's case. We cannot say that the Subordinate Judge was not entitled to draw the inference that the property belonged in *jenmi* to the plaintiff's *mana* and that

the defendants' *tarwad* held them as *kanomdars*. Where the property is conceded to have belonged originally to certain persons and others have been recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice. The decision of the Bombay High Court in *Bala* v. *Shiva* (1) applies to such classes of cases. The burden of proof is shifted to the defendants to establish their title. Mr. Anantakrishna Aiyar relies upon *Krishna Pillai* v. *Rangasami Pillai* (2), *Vasudevan Nambudri* v. *Krishna Pisharoti* (3) and *Koru Nair* v. *Kesavan Nambudri* (4) to show that where a particular mortgage is sued upon, Courts should not give relief on a mortgage not pleaded in the case. These decisions do not affect the present case. Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where title is denied and possession is not shown to have been under the owners. The facts appearing in evidence in this case are enough in the circumstances already mentioned to prove the demises sued on.

There is another ground upon which the decision of the Subordinate Judge can be supported. The *kanom* deeds relied upon have not been produced. If the plaintiff's claim is true, the deeds must be in the possession of the defendants. They deny the *kanom*. The plaintiff produces Exhibit A which, he alleges, is a *maruput* or copy of one of the *kanom* documents. It is not signed ; nor has there been any proof of its execution. It purports to be more than 30 years old. The Subordinate Judge held it to be genuine. He says that it is customary in Malabar for *jenmies* "to keep *maruputs* or copies of *kanom* documents." Mr. Wigram in his book on Malabar Law refers to this practice. In *Parameswaran Nambudripad* v. *Ammunni Nair* (5), *marupattam* is said to be "a copy of the document executed to another to be retained by the party executing it." Exhibit A corresponds to this description. It comes from proper custody. It is argued that the presumption as to ancient documents contained in S. 90 of the Evidence Act does not apply to copies. In *Appathura Pattar* v. *Gopala Panikkar* (6), it was stated that the presumption suggested in S. 90 and in S. 114, illustration (*g*), does not apply to copies of documents. But in *Ponnambalath Parapravan Karoth* v. *Sankaran Nair* (7), the learned Judges were not prepared to follow the earlier ruling. It seems to us that it would be unduly narrowing the scope of S. 90 to hold that copies of the documents are not within the rule. In the language of illustration (*g*) to S. 114, a presumption arises against the defendants by the non production of the original. See *Rajah Kishen Dutt Ram Pandey* v. *Narendra Bahadur Singh* (8) and *Ram Prasad* v. *Raghunandan Prasad* (9). Under the Evidence Act, where the original is not produced, a copy made from the original can be exhibited to prove the transaction. S. 90, which follows the sections relating to proof by secondary evidence, refers to presumption regarding "any document." There is nothing in its language to restrict its operation to original documents only. The rule of law is thus stated in Wigmore on Evidence, Volume III, S. 2143 (sub-S. 2) : "Where the alleged ancient *original* is *lost* and an *ancient purporting copy* is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient document rule." The authority of Lord Eldon and of Chief Baron Gilbert is quoted in support of this proposition. In *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (10), the principle of S. 90 was applied to certified copies. We think that the object of the section will be frustrated, if the presumption is not extended to copies. Of course, Courts must scrutinise such copies very carefully and should not apply the presumption until the conditions required by the section are strictly conformed to. We do not think that when all the tests are satisfied, the fact that the document affected is a copy and not the original should make any difference. We are, therefore, of opinion that the Subordinate Judge was right in acting on Exhibit A. In this view, his finding on the question of title and on the demises sued on must be upheld.

(1) (1903) 27 Bom. 271.
(2) (1895) 18 Mad. 462
(3) (1903) 13 Mad. L. J. 122.
(4) (1907) 17 Mad. L. J. 122.
(5) (1899) 9 Mad. L. J. 300.
(6) (1902) 25 Mad. 674.
(7) (1911) 12 I C. 453.
(8) (1875-76) 3 I. A. 85.
(9) (1885) 7 All. 738.
(10) (1900) 22 All. 294.

There are a few subsidiary points to be noticed. Exhibit A relates to 40 *paras* sowing land. It fixes the *parappad* payable to the landlord at 5 *paras*. It was argued that as there is no evidence in regard to the *parappad* on the other half of the suit properties, plaintiff is not entitled to any *parappad* in respect of it. In the view that we have taken, that Exhibit A is a copy of one of the two documents of the same date, there is no reason for not holding that the same terms were embodied in the other *kanom* as well. We see no reason for differing from the Subordinate Judge in this respect. We also agree with him that the defendants are entitled to get only the money value of the gold coins as on the date of payment. Exhibit E1 refers to the commutation value in rupees, and that indicates that parties never contemplated the return of the coins or the payment of their value at the time of the redemption. The Sub-Judge is also right in holding that the defendants are only entitled to get a sum of money which would secure to them in perpetuity 20 *paras* of paddy. The contention that the amount must be such as would enable the defendants to purchase a *jenm* right is extravagant. The Sub-Judge has rightly held that the defendants were bound to pay the enhanced Government revenue. After some conflict of views, it was decided in *Panambatta Kalathil Kunchu Menon* v. *Kalathinpadihil Narayanan Ezhutessan* (11) that the mortgagee in possession was chargeable with such payments. We think that this decision is right. The Subordinate Judge has decreed interest at the rate of 12 per cent. upon the arrears of rent due to the plaintiff. The claim is a stale one and we do not think he was justified in decreeing more than 6 per cent. See *Parasurama Pattar* v. *Venkatachalam Pattar* (12). But we think that no interest is payable in this case. The Judicial Committee of the Privy Council pointed out in *Ganesh Bakhsh* v. *Harihar Bakhsh* (13), that where the conditions of Act XXXII of 1839 are not to be found, interest by way of damages is not awardable under the Contract Act. It is on this principle, it was held in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (14), that where there has been an oral lease, no interest is payable on the arrears claimed. Our attention was drawn to an unreported judgment of this Court in Appeal No. 187 of 1899, which seems to suggest that if the contract is in writing, interest may be decreed. We are unable to follow this decision. Their Lordships of the Judicial Committee lay stress upon the clause in the Act which says that the claim must be made "by virtue of some written instrument at a certain time." Sir Francis Maclean and Banerjee, J., construe this clause to mean that the date of payment must be definite. See *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (15). Exhibit A contains no stipulation for payment of the rent at any fixed time. It only provides that the various payments "should be given per year." There is no evidence in this case that such payments were made or claimed at any particular period of the year. The object of the Act is to penalise the person who withholds payment when the same is due. That is the reason why provision is made for interest running after demand. In the present case, there is no period fixed for payment. There has been no demand; and there is no stipulation for interest in the copy produced. Under these circumstances, we must disallow the interest decreed by the Subordinate Judge. Subject to this modification, the second appeal is dismissed. Parties will give and receive proportionate costs throughout. Six months' time from this date for payment.

S. N./R. K.

Appeal dismissed; Decree modified.

(11) A. I. R. 1915 Mad. 100=25 I. C. 641.
(12) A. I. R. 1914 Mad. 661=21 I. C. 701.
(13) (1904) 26 All. 299=31 I. A. 116 (P. C.).
(14) (1897) 20 Mad. 481.
(15) (1899) 26 Cal. 955.

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AYLING AND TYABJI, JJ.

Muruga Chetty and *others*—*Plaintiffs*—Appellants.

v.

Rajaswamy and *others*—*Defendants*—Respondents.

Second Appeal No. 1045 of 1907, decided on 5th August 1915, from the decree of Dist., Judge, South Arcot, in Appl., Suit No. 355 of 1906.

(a) Civil P. C. (5 of 1908), O. 22, R. 9 (2)—Order setting aside abatement of appeal can be made without notice—It cannot be challanged before another bench—Proper remedy is review.

An order made by a Division Bench of the High Court setting aside the abatement of a second appeal under O. 22, R. 9 (2), cannot be questioned by a different Bench, even though the order may be *ex parte* as the order does not require the issue of a notice. The only proper way of setting it aside is by way of review. 16 I.C. 567 ; and 33 Cal. 1178 (P.C.), Foll. ; 5 C.L.J. 310 distinguished. [P. 131, C. 2.]

(b) Adverse Possession—Person allowed to act as trustee for communiny, handing over possession of land to stranger—Possession is permissive and not adverse.

If persons purporting to act as trustees on behalf of a community and allowed so to act by it, give possession of a land belonging to the community to a third person, the possession of the latter is at its inception only permissive and not adverse to the community. [P. 135, C. 1.]

(c) Limitation Act (9 of 1908), Art. 120—Cause of action for declaratory suit by village community arises from date of knowledge of adverse possession—Knowledge of some members does not affect right of others.

The cause of action for a declaratory suit, based on denial of title, does not arise until the plaintiff has knowledge of the denial. A. I. R. 1914 Mad. 429, Foll. [P. 135, C. 2.]

In such a case knowledge on the part of some of the members of the community does not affect the right of the others. [P. 135, C. 2.]

T. Rangachariar—for Appellants.

M. O. Parthasarathy Aiyangar, T. R. Ramachandra Aiyar and *T. V. Seshagiri Aiyar* - for Respondents.

Facts.—The properties in suit originally formed certain *nandavanams* (flower gardens) attached to the temple of Devaraja Pillayar Swami in Chidambaram belonging to the Vedamba Chetty community of that place. One Chidambaram Chetty having claimed them as his private property, certain members of the said Vedamba Chetty community presented a petition to the Sub-Collector objecting to their registration in Chidambara's name and praying that the name of the idol of the temple might be substituted for that of one Muthuveerappa Chetty. The Sub-Collector, however, transferred the *putta* in the names of Chidambara, Appasami and Subraya. In 1893, the nephew of Chidambara and the son of Appasami sold the said gardens to one Ponnambalaswami, who improved the property by spending a large sum of money. The plaintiffs brought the present suit as the representatives of the Vedamba Chetty community, for a declaration that the suit properties were trust properties and that the alienation of the same in favour of Ponnambalaswami was not valid and binding on the community and for recovery of their possession after demolishing certain buildings erected thereon by Ponnambalaswami's representative in interest. The defendants pleaded *inter alia* that the property was private property, that they purchased the same *bona fide* and for valuable consideration without notice of the trust and that they had been in possession for over 12 years and had consequently acquired title by adverse possession. The District Munsif dismissed the suit, after recording findings on all the issues in the case. On appeal the District Judge dismissed the suit as barred by limitation. The plaintiffs thereupon preferred this second appeal.

Ayling, J.—The preliminary objection is raised that in consequence of appellants' failure to apply within six months of the death of the original 2nd defendant (which took place on 11th June 1911) to bring his legal representative on record, the appeal must be held to have abated as regards that party.

An application to set aside the abatement was made on 16th December 1912 and on this an order as prayed for was passed *ex parte* by Benson and Sundara Aiyar, JJ., on 6th February 1913.

Mr. Seshagiri Aiyar argues that this order being passed *ex parte* is not conclusive ; and that he is entitled to ask us to re-consider the matter of the abatement in the light of the further affidavits since filed.

In my opinion this contention cannot be accepted and the order, dated 6th February 1913, is final subject only to review. O. 22, R. 9 (2), Civil Procedure Code, does not require the issue of notice : and it cannot be said that on this account the order of a competent Bench of two Judges is illegal ; or that the subject-matter of it can be reconsidered by a different Bench. It is open to any party who conceives himself to be injuriously affected by the order to apply for a review under O. 47 : but no such application has been made in the present case, and we must, therefore, treat the order as final.

This view appears to me to be strictly in accord with that taken in two of the cases quoted to us [*Tekait Ajant Singh* v. *Sundar Mall* (1) and *Ganeshwar Singh* v. *Ganesh Das* (2).] In the remaining case, which is reported as *Tripura Sundari Debi* v.

(1) (1912) 16 I. C. 567.
(2) (1906) 33 Cal. 1178 = 33 I. A. 134.

Dakshina Mohun Roy (3), an *ex parte* order of a single Judge bringing a legal representative on record was held not to preclude the Bench before which the appeal came for disposal from considering the question of whether the application was within time and if not whether the abatement should be set aside. That case is, however, easily distinguishable. Apart from the fact that it was not an order setting aside abatement and was passed by a single Judge, there is the important distinction that it appears to have been passed in ignorance of the fact that the application for substitution of the legal representative was made after the prescribed time and that the appeal was liable to be abated, that is to say the question which the Bench was asked to decide had not been considered before at all.

In my opinion the preliminary objection must be set aside, and the appeal disposed of on its merits.

Tyabji, J.—A preliminary objection is taken before us that the appeal must be taken to have abated as against the original 2nd defendant, or rather that the setting aside of the abatement, to which I shall presently refer, was invalid, or otherwise of no effect as against the present 2nd defendant.

The 2nd defendant (Veerappa Gnanana Desikaswamigal) died in June 1911. The appeal against him, therefore, abated in December 1911. An application was made to the High Court on behalf of the appellants for setting aside the abatement and for causing the legal representative of the deceased to be made a party to the proceedings, on the 16th of December 1912. The application was supported by an affidavit in which it was stated that the applicant did not know of the death of the 2nd defendant till October 1912. It was heard by a Bench of the High Court consisting of Benson and Sundara Aiyar, JJ. We are informed by the learned pleader for the appellants that an explanation of the delay between October 1912 and the 16th of December 1912 was asked, and that, on certain letters being read to the Court, the explanation was accepted; and on the 6th of February 1913, it was ordered "that the abatement be set aside and that the name of Annamalaiswami be entered in the record of the second appeal and in the register of this Court as the legal representative of Veerappa Gnanana Desikaswamigal, the said deceased 2nd respondent in Second Appeal No. 1045 of 1907."

It is argued on behalf of the legal representative of the 2nd defendant that as a matter of fact, there was no sufficient cause within the meaning of O. 22, R. 9, Civil Procedure Code, preventing the appellant from continuing the appeal and that, therefore, the order setting aside the abatement was wrongly made and that we should now consider the appeal as having abated. It is said that we have power to cancel or otherwise to disregard the order setting aside the abatement, because that order was made to the prejudice of the 2nd defendant in proceedings to which he was not a party. The order is said to be wrongly made, because from the affidavit filed by the appellants it is clear that there was a delay of about two months, for which it is argued that no proper explanation is forthcoming, and because, even if there was any sufficient cause preventing one of the appellants, there was none as regards the other.

O. 22, R. 9 is imperative in this sense that, provided that "it is proved that he (the applicant) was prevented by any sufficient cause from continuing the suit," there is no option left to the Court, for it is laid down that in that event "the Court *shall* set aside the abatement." There is no appeal from an order setting aside the abatement, though there is one from refusal to do so: O. 43, R. 1 (*k*); nor can we in this case assume to ourselves the powers which a Court of Appeal may have under the ruling of *Kichilappa Naickar* v. *Ramanujam Pillai* (4). It, therefore, remains to consider whether we have inherent jurisdiction to reconsider the question whether the abatement should have been set aside on the 27th of February 1913. It is argued that we have this jurisdiction because the respondent's rights have been prejudiced by the order setting aside the abatement and the argument was supported by the following words which were used by the Privy Council in *Ganeshwar Singh* v. *Ganesh Das* (2):—

"Their Lordships entirely agree with the learned Judges of the High Court that it is 'an elementary principle, which is binding on all persons, who exercise judicial or *quasi*-judicial powers, that an order should

(3) (1907) 5 C. L. J. 310.

(4) (1902) 25 Mad. 166 (F. B.)

not be made against a man's interest without there being given to him an opportunity of being heard."

In that case the question was whether the plaintiff could obtain possession of certain property from the defendant and this depended upon whether an execution sale was rightly set aside by the Commissioner of Patna, and whether the absence of the purchaser at the time when the order setting it aside was made was sufficient to invalidate that order as against the purchaser. Their Lordships' after making the remark cited by me, say :—

"But, however this may be, it seems to their Lordships that the proper remedy of the purchaser, if aggrieved by this order having been made in his absence, was to apply to the Revenue Authorities for a rehearing, and that it is now too late to ask for a remand on that ground."

This is, in effect, a re-statement of the penultimate paragraph of the judgment of Trevelyan and Bonerjee, JJ., whose judgment was under appeal. They are reported to have said in *Gunessar Singh* v. *Gonesh Das* (5) :—

"A similar reasoning would prevent our entertaining any objection to the Commissioner's order on the ground that he had not heard the purchaser. If the purchaser was aggrieved on this account, there is no doubt that he could have found an appropriate remedy in the procedure of the Revenue Court ; but whether that be so or not, we cannot treat as invalid an order made by the Tribunal to which the Legislature has entrusted the power of making such order. We have no power to enquire into the circumstances under which the order was made or into the propriety of the order."

It is, therefore, clear that their Lordships of the Privy Council approved of the decision of the High Court that the High Court had no power to "treat as invalid an order made by the Tribunal to which the Legislature has entrusted the power of making that order"; and this notwithstanding that that Tribunal, in making the order in question, had in the opinion of the High Court "violated an elementary principle which is binding on all persons who exercise judicial or *quasi*-judicial powers."

It cannot be questioned in the case now before us that the order setting aside the abatement was made by the Tribunal empowered to make it; and, even if it is permissible to us to assume, for the purposes of argument, that on the materials then before the Court, the order ought not to have been made, it cannot be contended that there was any irregularity vitiating the proceedings; for it is admitted that the application under O. 22, R. 9, may be made *ex parte*, and that in the usual course it would be made *ex parte*.

There is, it is obvious, one distinction between the case just cited and the present one. In that case, the order sought to be set aside was that of a Revenue Court. Here it is an order of the High Court in these very proceedings. But, sitting in the Court in which we do, we have no power to interfere with the order passed by Benson and Sundara Aiyar, JJ., and there have been no proceedings for getting a review of that order. Indeed when it is considered how inapplicable any method of procedure either of review or of appeal would be for interference by us with the order in question, it seems to me to be clear that the Legislature intended such an order to be final so far as this Court is concerned.

I must now refer to two decisions on which reliance was placed. The first is *Tripura Sundari Devi* v. *Dakshina Mohun Roy* (3). In that case there never was any order setting aside the abatement. The legal representative of the 4th defendant Tripura, who was the appellant, applied to be put on record when six months had elapsed after the death of the deceased appellant, and was put on record without the abatement having been set aside : nor was the attention of the Judge called to the fact that the appeal had abated when the appellants's representative was put on the record. Then, at the hearing of the appeal, for the first time the question was considered whether the abatement that had taken place on the expiry of the six months should be set aside. The Court permitted affidavits and counter-affidavits to be filed, considered them, and came to the conclusion that there was no reason why the abatement should be set aside. The case is no doubt authority for the proposition that, if after the appeal has abated the legal representative is wrongly brought on the record without the abatement being set aside, then the question whether or not the abatement should be set aside has still

(5) (1898) 25 Cal. 789.

to be considered by the Court to whose notice that fact is brought for the first time. It has no bearing, as it appears to me, on the point whether we have power to set aside or disregard the setting aside of the abatement in the present case :—

The other case relied upon before us is that of *Tekait Ajant Singh* v. *Sundar Mall* (1). That case seems to be distinguishable in this respect that there the question which the Subordinate Judge had to consider was one necessarily affecting the merits of the subject-matter of the suit ; it affected the original plaintiff because he was made a *pro forma* defendant instead of plaintiff, on the ground that he had assigned his rights to the applicant, and that the rights on the basis of which he had come to the Court were no more vested in him ; it affected the defendants because the scope of the suit was enlarged so as to include the rights not only of the original plaintiff, but also of a stranger to the suit whose assignee the applicant claimed to be. It was admitted there that the further hearing of the suit on the merits could not proceed without those questions being determined ; but the Subordinate Judge thought that a fresh suit was necessary for their determination.

In the appeal now before us the question whether the order setting aside the abatement was made rightly or wrongly will not affect the merits of the appeal in any way. The question depends merely upon whether the appellant was prevented by sufficient cause from making his application earlier. The causes preventing the appellant from making the application were quite independent of and did not affect the rights of the deceased respondent and his legal representative.

My conclusion is, therefore, that the order of Benson and Sundara Aiyar, JJ., setting aside the abatement was made by a Court perfectly competent to do so ; that we have no power to question the correctness of that decision and that without doing so we cannot now consider that the appeal has abated.

It is unnecessary in this view to consider the other points argued by Mr. Rangachariar, and to determine whether the successor-in-office of the 2nd defendant is his legal representative within the terms of the Civil Procedure Code, S. 2 (11), and whether Article 177 or Article 181 of the Limitation Act was applicable.

I agree for these reasons that the appeal must proceed on the basis that its abatement has been set aside.

[The appeal was then heard on the merits].

Judgment.—This second appeal arises out of a suit for a declaration that the properties referred to in the plaint are trust properties, for the removal of certain buildings erected on the land and for delivery possession of the land to the plaintiffs on behalf of the community, to which the plaintiffs allege that they and the defendants Nos. 4 to 27 belong. The claim was resisted on several grounds which seem to have been sufficiently raised in the issues framed in the suit.

The District Munsif somewhat reluctantly recorded findings on all the issues. He felt himself constrained to do so by the state of the pleadings. The District Judge has not considered all the issues. He seems to have overlooked the fact that the suit was not one merely for ejectment as he states in the beginning of his judgment. The pleadings in the suit are by no means perfect. But it seems that the real points on which the parties were at issue were, whether the property was private property or was to be held in trust for the community of the plaintiffs ; and *secondly*, whether the rights of the community (if any) had been lost by a valid gift, or by adverse possession or by purchase in good faith for consideration without notice of the trust. As a subsidiary point it may also have had to be decided whether though the community may have the rights that they claim, they can now, on the facts as stated in the plaint, ask for immediate possession of the land. The subsidiary point does not affect the question whether the plaintiffs can claim the declaration above referred to. But we wish to record that the plaintiffs by their Pleader had to concede at the hearing that the last sentence of paragraph 2 of the District Judge's judgment cannot be attacked by the plaintiffs. That sentence is as follows :—

" On the plaint allegations the suit for ejectment is clearly not sustainable, for 1st defendant has not left Chidambaram and he is certainly not dead."

The District Judge has ultimately decided the case apparently on the sole

ground that the suit is barred by limitation. He seems to have misunderstood the nature of the suit which he has treated as one for ejectment only, overlooking the other points on which the parties were really at issue. His finding on the question of limitation cannot, therefore, be accepted. For the purpose of his finding on the question of limitation he seems to have assumed that the community was originally the owner of the land. In that case, if persons purporting to act as trustees on behalf of the community, and allowed so to act by the community, give possession of the land to a third person, that person's possession cannot initially be adverse to the community. The question that has to be decided in such a case is whether the possession which was originally permissive ever became adverse and, if so, at what time and whether it continued adverse for the period required either for creating rights under S. 28 of the Indian Limitation Act or for preventing under Article 142 or Article 144 of the first Schedule to that Act the rightful owner from asserting his rights by suit.

On the points which arise, therefore, the District Judge has not expressed any opinion. We must consequently ask the District Judge to record findings on all the issues in the case on the evidence on record. We have felt it necessary to indicate why we consider it desirable to ask for findings, but in so far as our remarks proceed on assumptions of fact we do not wish to restrict the District Judge in his consideration of the evidence. The plaintiffs will, however, be bound by the concession which their Pleader was forced to make and there cannot in any case be a decree for immediate possession.

The findings should be submitted within six weeks from this date and seven days will be allowed for filing objections.

* * * *

[In compliance with the order contained in the above judgment, the District Judge of South Arcot submitted a finding on all points in favour of the plaintiffs, except that he found that the plaintiffs could not maintain the suit as they had not asked for the appointment of trustees as a consequential relief.]

Judgment.—We accept the findings. The 1st appellant states that he does not press the appeal. The 7th appellant, however, claims that on the findings accepted by us, there ought to be a declaration that the properties referred to in the plaint are trust properties belonging to the Vedamba Chetty community, subject to the right of the 1st defendant to be in possession thereof so long as he lives in Chidambaram.

Mr. T. R. Ramachandra Aiyar, for the 3rd defendant, argues that the claim for a declaration is barred under Article 120 of the Limitation Act as it accrued at the date of the sale in 1893 The 7th plaintiff denies that he had any knowledge of this sale-deed within six years of the date of the suit. Following *Thirumala Rao* v. *Kadekar Durgi Shettethi* (6), to which one of us was a party, we hold that the cause of action for a declaratory suit based on a denial of title does not arise until the plaintiff has knowledge of the denial. Mr. T. R. Ramachandra Aiyar argues, however, that some of the members of the community had knowledge at the date of the sale-deed, as they were parties to it. In our opinion, the knowledge of some of the members cannot affect the right of the others.

It is then argued that in our discretion we ought not to make the declaration. When the majority of the co-owners are proved to have had knowledge of the denial of title, it may, no doubt, be a reason for declining to grant a declaration in favour of one of the other co-owners who asserts that he had no knowledge. In the present case, however, it seems to us that it is necessary for the declaration to be made, as otherwise the whole of this litigation will have been fruitless, though the defendant set up a false deed of gift and a collusive sale. The plaintiffs, however, claimed to be entitled to possession to which they were not entitled. We think, therefore, that the declaration should be given but without costs. Each party will bear his costs throughout.

S. N./R. K.

Appeal allowed.

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(6) A. I. R. 1914 Mad. 429=22 I. C. 883.

A. I. R. 1916 Madras 136

WALLIS, C. J. AND SRINIVASA AIYANGAR, J.

A. Bharadwaja Mudaliar—Defendant—Appellant.

v.

Kolandavelu Mudaliar and *others*—(Plaintiffs) and Defendant—Respondents.

Appeal Suit No. 195 of 1914, decided on 6th October 1915, against the decree of Dist., Judge, North Arcot, in Original Suit No 9 of 1913.

(a) Will—Bequest Bequest of six acres out of nineteen acres is not void for uncertainty—Legatee has vested interest and his representative can get it partitioned.

A Hindu agriculturist bequeathed to his father's sister's second son "six acres of good irrigated *nanja* lands" and died leaving behind him 19·40 acres of land answering to that description. The legatee died before he got the bequest and his heirs sued the residuary legatee for possession of six acres and for mesne profits. The residuary legatee contended that the legacy of six acres was void on account of uncertainty:

Held, that the legacy was not void on account of uncertainty and that the intention of the testator, as gathered from the document, was that, in the absence of agreement, the lands in question should be partitioned by the Court and six acres out of the 19·40 acres allotted to the legatee who had a vested interest in them as a tenant-in-common along with the residuary legatee. [P. 136, C. 2 & P. 138, C. 1.]

(b) Will—Construction—(Per Wallis, C.J.)—English rules do not apply to Wills of Hindu agriculturists.

Per *Wallis, C. J.*—English rules of construction of Wills are too artificial to apply to the Wills of Hindu agriculturists. [P. 136, C. 2.]

(c) Will—Bequest—(Per Srinivasa Aiyangar, J.)—Will is not void for uncertainty unless some construction is impossible.

(Per *Srinivasa Aiyangar J.*—A Will is not void for uncertainty unless it is utterly impossible to put a meaning upon it.) [P. 138, C. 1.]

G. S. Ramachandra Aiyar—for Appellant.

S. Srinivasa Aiyanger and *C. V. Ananthakrishna Aiyar*—for Respondents.

Wallis, C. J.—The legacy in this case is of six acres of good irrigated *nanja* lands in the village of Pudur. Assuming that the legacy is out of the *nanja* lands owned by the testator, the Will does not say which of them the legatee is to have; and in England such a bequest would have been held void for uncertainty, but for the benevolent rule of construction that the testator is intended to have left the choice to the legatee: *Tapley* v. *Eagleton* (1), Bacon's Abridged Title, Election A, and the other authorities referred to in *Narayanasami Gramani* v. *Periathambi Gramani* (2), where the rule was applied and recognised. The reasons for reading into the Will something that is not there, *viz.*, that the legatee should himself make the selection, was that without such a provision, the legacy was regarded as bad for uncertainty. In the present case unfortunately, the legatee died without making the election, and the accepted view in England would appear to be that the Will cannot be read as intending that the heirs of the legatee should be allowed to make the election in the event of the legatee dying without having made it. See the old authorities cited in Bacon's Abridged Title, Election C. that would be equivalent to reading it as a bequest of six acres to be elected by the donee and his heirs. In *Earl of Bandon* v. *Moreland* (3), where under a settlement a power of election was given to the beneficiary, his heirs or assignees, it was held that this disposition offended against the rule against perpetuities, but that the powers of the beneficiary and of his heirs or assignees were severable, and that an election made by the beneficiary himself in his life-time would be supported. The same rules were recognised and applied in *Savill Brothers Limited* v. *Bethell* (4). These are however, somewhat artificial rules to apply to the Will of a Hindu agriculturist who was no doubt familiar with the ordinary process of partitioning lands by the Court in a partition suit, and I think it much more likely that his intention was that in the absence of agreement, the lands in question should be partitioned by the Court than that the legatee should be left to make a selection for himself. In this view I see no sufficient reason why the Court should not give effect to the testator's intention by partitioning off and allotting to him land of the nature and extent indicated in the Will out of the land left by the testator and I concur in the order proposed by my learned brother, whose Judgment I have had the advantage of reading.

Srinivasa Aiyangar, J.—This appeal raises a question of some difficulty on the construction of a clause in the Will of one Dhanakoti Mudaliar. The clause in question reads thus: "I give to my father's sister's

(1) (1879) 12 Ch. D. 683.

(2) (1895) 18 Mad. 460.

(3) (1910) 1 Ir. R. 220.

(4) (1902) 2 Ch 523.

second son, Murugesa Mudaliar, my big house at Tiruvannamalai and also six acres of good irrigated *nanja* lands in the village of Pudur in Arcot Taluk and also give him Rs. 3,000 without any restriction from me." No question arises now as to the bequest of the house or of the legacy of Rs. 3,000. Murugesa Mudaliar, the legatee, is dead and his sons are the plaintiffs in this suit. It appears from the evidence that the testator had, besides other lands, 19·40 acres of land in the village of Pudur which answer the description of good irrigated *nanja* lands, though all of them are not of quite the same quality. They are the lands described in Schedule B to the plaint. The plaintiffs' claim six out of the 19·40 acres and state that the 1st defendant, who is the residuary legatee and also executor by implication, has failed to put them in possession of the six acres and they ask for a decree directing the 1st defendant to deliver possession of six acres of good irrigated *nanja* lands out of the B Schedule lands in Pudur. In the Schedule, there is a note stating that items 1 to 15 measuring 9 acres 2 cents are good irrigated lands and that plaintiffs want 6 out of the 9 acres 2 cents. The 1st defendant pleaded that he never objected to the plaintiffs' taking their portion of the *nanja* lands in Pudur bequeathed to their father and that he was not, therefore, liable for mesne profits ; and also proceeded to state that the provision in the Will was vague, indefinite and uncertain, and that the plaintiffs had to make their selection from the whole of the lands in Pudur Village possessed by the testator, and not solely from the 19·40 acres (paragraph 10 of the written statement). At the 1st hearing, the 1st defendant definitely gave up the contention that the devise of the six acres was void for uncertainty. Judge's Notes printed at page 12 of the printed book. The only question then that required determination was whether the plaintiffs were entitled to 6 out of 19·40 acres or 6 out of the whole of the extent, the particular six acres being determined by division and not by selection. The District Judge in the Court below has, however, held that the plaintiffs were entitled to select six acres of land out of the lands belonging to the testator in the village of Pudur. The 1st defendant appeals against the decree and contends that the legacy of six acres was void for uncertainty, and the first question is whether there is any uncertainty as to the subject-matter of the legacy.

The Will is in English ; but it is clear that the testator was not able to express himself accurately or clearly in that language. The lands which are given are ordinarily cultivable lands. Their extent is certain and their locality immaterial, as their value does not depend upon their situation as in the case of house sites. There is nothing in the Will to indicate that the testator intended the legatee to select any particular six acres he desired. It seems to me that the testator had no idea of any selection by the legatee. In cases, where out of a number of distinct articles or properties some are bequeathed, it is obvious that the testator must have intended the particular properties to be selected by some one, whether it is the legatee or the executor ; as for example, one out of the several houses or so many out of the horses in the testator's stable. If again, the devise is of a certain quantity of land at or near a particular place, as for example, twenty acres of land near a house or surrounding a house, then presumably the testator leaves it to the legatee to select the particular twenty acres. So also when a testator is possessed of lands of different descriptions as pasture lands, building sites, garden lands, forest lands and cultivable lands and if he gives only a particular extent, a right of selection may be implied. In the case, for instance, of cash or commodities, there could be no doubt that a legacy of a particular quantity means a fraction of the whole. In the case of lands which may not be all of the same quality, the testator's intention may be to give to the legatee, a right to select a particular quantity from out of a particular locality ; that is a matter of construction. In this case, the lands given are ordinary cultivable lands and there is no reason to suppose that the testator made any difference or had any idea of difference with reference to any particular place or locality. I think the reasonable interpretation of the words used by him is that he intended to give to the legatee that fraction out of the total quantity of land which would give him the extent specified in the Will. It is also clear that the testator intended the legatee to have the six acres of land immediately on his death. If the testator intended that the property should vest only on a selection made by the legatee, the language used by him would have heen different. We should, I think, construe the Will so as, if possible, to give

effect to the legacy. "The modern doctrine," as stated by Jessel, M. R., " is not to hold a Will void for uncertainty unless it is utterly impossible to put a meaning upon it." *In re Reborts ; Repington* v. *Roberts* (5). I am, therefore, of opinion that the legatee had a vested interest in six out of the 19·40 acres as a tenant-in-common along with the residuary legatee, and is entitled to division by metes and bounds of the 19·40 acres, and have an allotment made to him of six acres. He is, I think, also entitled to mesne profits of the lands for three years prior to the suit as claimed in the plaint. Subject to this modification, the appeal is dismissed with costs.

The memorandum of objections is allowed. There will be no order as to costs.

S. N./R. K.

Appeal dismissed.

(5) (1881) 19 Ch. D. 529.

A. I. R. 1916 Madras 138

KUMARASWAMI SASTRI, J.

T. Ramakrishna Chetty and *another*—Plaintiffs.

v.

G. Venkatasubbiah Chetty and *others*—Defendants.

Civil Suit No. 145 of 1914, decided on 14th December 1914.

Limitation Act (1 of 1908), Ss. 19 and 20—Endorsement of payment on promissory note even if payment is denied will operate as acknowledgment.

Where on a promissory-note, dated 24th January 1911, there was an endorsement as follows:—"On the 22nd January 1914, the amount paid towards this promissory-note in ready money is Rs. 10, in words rupees ten." And the defendants pleaded that no payment of Rs. 10 was made by them and that the endorsement was not sufficient to save limitation :

Held, that the endorsement would be sufficient as an acknowledgment of liability and would save limitation even if no payment was made.

[P. 139, C. 1.]

An endorsement which is not good as a payment under S. 20 of the Limitation Act might still be sufficient as an acknowledgment under S. 19 of the Act. 27 I. C. 744 and 27 I. C. 747, Foll.

[P. 139, C. 1.]

M. N. Duraiswami Iyengar—for Plaintiff.

M. Venkatasubba Rao—for Defendants.

Judgment.—The plaintiffs sue to recover Rs. 4,294 with costs and further interest due on a promissory-note, dated 24th January 1911, executed by defendants Nos. 1 to 3 in respect of dealings between the parties.

Defendants Nos. 4, 5 and 7 are the sons of the 1st defendant. Defendants Nos. 6 and 8 are sons of the 2nd defendant.

It is alleged that the defendants are members of an undivided family and that the trade carried on by defendants Nos. 1 to 3 is family trade. It is also alleged that the suit is not barred by limitation, by reason of the payment of Rs. 10 towards interest by defendants Nos. 1 to 3 on the 22nd January 1914, which payment was endorsed on the promissory-note and signed by them.

Defendants Nos. 1 to 3 filed a written statement admitting the execution of the promissory-note, but pleading that they did not pay the sum of Rs. 10 towards interest on the 22nd January 1914 and that the endorsement is not sufficient to save limitation as it does not satisfy the requirements of S. 20 of the Limitation Act. defendants Nos. 4 and 5 are *ex parte* ; 6th Defendant did not file a written statement ; 7th and 8th defendants, through their guardian *ad litem*, filed a written statement putting the plaintiffs to the proof of the various allegations in the plaint and to the validity of the endorsement saving limitation.

The following issues were settled :—

(1) Was the payment on 22nd January 1914, as alleged in the plaint, and if so, is it sufficient to save limitation ?

(2) If not, is the endorsement on the promissory-note good as an acknowledgment ?

The note was executed on the 14th January 1911. On the 17th January 1914 the plaintiffs applied for leave to file the suit in the High Court and notice was ordered returnable on the 24th. The 2nd plaintiff then went to the defendants' village and according to him, he demanded the payment of the amount due on the promissory-note and defendants Nos. 1 to 3 paid Rs. 10 for interest and made the endorsement (Exhibit A), which was written by the 5th defendant, who is the son of the 1st defendant, and signed by defendants Nos. 1 to 3. The endorsement (Exhibit A) runs as follows :—" On the 22nd January 1914 the amount paid towards this promissory-note in ready money is Rs. 10, in words rupees ten."

It is attested by three witnesses *viz.*, P. Parthasarathy Aiyangar, Venkatasubbayya and the 5th defendant. Second plaintiff states that after making the endorsement he came to Madras. and that he made the entries (Exhibit B1 and B2) in his cash-book (Exhibit B) and ledger (Exhibit B) which are to the effect that Rs. 10 was paid on account of interest. The defendants admit making the endorsement, but their case is that the 2nd plaintiff came to their village and said that the note was about to become barred and asked them to make an endorsement on the promissory-note and that the endorsement was made without any money being paid at the time.

* * * *

I am of opinion that Rs. 10 was paid on the date of the endorsement [Exhibit A (1)]. The next question is whether it was paid for interest or principal.

* * * *

The entries [Exhibits B (1) and b (1)] made almost immediately after the endorsement show that the payment was for interest and the probabilities support this view. I find the first issue in plaintiffs' favour.

Second Issue. Even assuming that there was no payment of Rs. 10 as alleged by the defendants, the endorsement would be sufficient as an acknowledgment of liability and would save limitation. The endorsement has already been set out by me in full and whatever my own opinion might be, I am bound to follow the decision in *Visvanatha Santhasingaro* v. *Ramachandra Mardraja Deo* (1), and *Jaganadha Sahu* v. *Rama Sahu* (2), where it was held that an endorsement which was not good as payment under S. 20 might still be sufficient as acknowledgment under S. 19 of the Limitation Act. In the present case it is admitted by the defendants that the parties signed the endorsement with the intention of its being an acknowledgment of liability and saving limitation. The wording of the endorsement is similar to the acknowledgments which in *Visvanatha Santhasingaro* v. *Ramachandra Mardraja Deo* (1) and *Jaganadha Sahu* v. *Rama Sahu* (2), were held to be sufficient under S. 19 of the Limitation Act. I hold that the endorsement is good as an acknowledgment. It follows from my findings that the suit is not barred by limitation.

There will be a decree for the amount claimed with costs and further interest against defendants Nos. 1, 2 and 3 personally and against defendants Nos. 4, 5, 6, 7 and 8 to the extent of any joint family properties in their hands.

S.N./R.K.

Suit decreed.

(1) (1915) 27 I. C. 744.
(2) (1915) 27 I. C. 747.

A. I. R. 1916 Madras 139

SESHAGIRI AIYAR AND KUMARASWAMY SASTRI, JJ.

Velayutham Pillai – Defendant—Appellant.

v.

Subbaroya Pillai and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 70 of 1914, decided on 23rd September 1915, from the decree of Tempy., Sub. Judge, Cuddalore, in Appeal Suit No. 20 of 1913.

(a) Limitation Act (9 of 1908), Arts. 134 and 144 – Widow's sale declared to be a mortgage and decree for redemption by reversioners after widow's death passed—Widow's alienee transferred to one reversioner—Held his possession though adverse, limitation for redemption began after widow's death—Till widows death possession of one reversioner was on behalf of the other.

On the suit of one of two reversioners, a sale was declared to be a mortgage in 1885 and the plaintiff was given a decree to redeem the property after the death of the widow in case she died without redeeming it. In 1893, the purchaser, whom the decree had declared to be a mere mortgagee, sold the property to the other reversioner and put him in possession. On the widow's death in 1900, the said two reversioners were the only heirs of her husband. When in 1912 the former sued for redemption of the property, the latter pleaded adverse possession from the date of his purchase:

Held, (1) that although the possession of the defendant reversioner when it commenced in 1893 was hostile, yet it ceased to be so in 1900 when on the widow's death succession opened to both the reversioners; [P. 141, C. 1.]

(2) that on the death of the widow, the defendant must be deemed to have held the property on behalf of the plaintiff as well. [P. 141, C. 2.]

(b) Adverse possession—Co-owner—Co-owner's possession must be notoriously adverse—Possession must be attributable to lawful title.

The possession of one co-parcener or co-owner cannot be adverse to the other until the latter is notoriously excluded by the former. [P. 141, C. 1.]

The possession should be *prima facie* attributed to a lawful title. [P. 141, C. 2.]

C. Padmanabha Iyengar—for Appellant.

C. V. Anantakrishna Iyer—for Respondents.

Order.—Without deciding at present whether notice, actual or constructive, which the purchaser had, will affect his right under Article 134 of the Limitation Act we think it necessary to call for a finding upon the following issue :—

"Had the 3rd defendant's adoptive father any actual or constructive notice of the decree obtained by the plaintiff in Original Suit No. 371 of 1885 against the widow or of the nature of the right of his vendor under the sale and the counter-agreement referred to in the pleadings in this case ?"

Parties may adduce fresh evidence.

The finding should be submitted within two months from this date and the parties will be at liberty to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order, the Temporary Subordinate Judge of Cuddalore submitted the following :—

Finding.—Plaintiff says that V. Palamala Pillai was examined as a witness in Original Suit No. 371 of 1885 and his deposition is filed as Exhibit E. It is clear from this that no questions were put to him about this property. Plaintiff says that after the death of Meenatchi Ammal he asked V. Palamala Pillai to receive Rs. 75 and give back this property to him and he promised to do so. If this statement is true, surely plaintiff would have stated it in his deposition when he was examined as a witness in this suit. When he was asked about it, he says that he mentioned this in Court, but he does not know whether the Court took it down in his deposition or not. I think this is a gross falsehood. I do not believe his present statement. It is clear he never mentioned it in his deposition when he was examined in the lower Court in this suit.

2. Plaintiff's second witness is his son's *sagalan*. He says that he was present at the time of the sale by S. Palamala Pillai to V. Palamala Pillai and he says that it was sold for Rs. 75 as there were litigations about this property. But he has not attested the sale-deed. I do not believe his present statement that he was present at the time of the sale. Nor do I believe his statement that the purchasers said that they should not buy it owing to Subbaraya Pillai's litigations. Plaintiff's third witness is a co-trustee of a temple with plaintiff. He says that he used to go to the Court when that suit was pending and he used to see V. Palamala Pillai attending the Court for that suit. It is clear that V. Palamala Pillai was examined as a witness in that suit on some other matter and so must have attended the Court. From this we cannot draw the inference that he was going there regularly or knew the judgment and decree in that case.

3. Plaintiff's witnesses say that the property was worth Rs. 300 and was sold by S. Palamala Pillai to V. Palamala Pillai for Rs. 75. It is admitted that Chella Pillai, the original owner of this property, sold it to S. Palamala Pillai for Rs. 75 only and so he sold it to V. Palamala Pillai for Rs. 75. There is nothing strange in this. As plaintiff's Pleader says it is possible that V. Palamala Pillai might have had notice of this decree or the nature of the right of his vendor. But with the evidence of plaintiff and that of his two interested witnesses who were examined just now, I cannot come to the conclusion that V. Palamala Pillai had any actual or constructive notice of the decree in Original Suit No. 371 of 1885 or of the nature of the right of his vendor under the sale and the counter of the agreement referred to in the pleadings.

4. I, therefore, find that V. Palamala Pillai had no such notice.

This second appeal came on for final hearing on the 17th of September 1915 after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial.

Judgment.—The properties in suit belonged to one Chella Pillai. He sold the properties to one Palamalai and obtained an agreement to reconvey the properties. After the death of Chella Pillai, the plaintiff, as one of the reversioners, sued his widow and the purchaser, Palamalai, in 1885 for a declaration that the property was only subject to a mortgage and that the alleged sale did not pass an absolute interest to the purchaser.

The decree in that suit was that the plaintiff was entitled to redeem the properties after the death of the widow in case she did not redeem the properties herself. After this decree, Palamalai sold the properties in 1893 to the father of the 3rd defendant and put him in possession. The widow died in 1900. On her death, the heirs of her husband were the plaintiff and the 3rd defendant. Plaintiff instituted this suit for redemption. The 3rd defendant pleaded among other things that as he and his father were in possession since 1893 under a sale from a mortgagee, they had perfected their title by prescription against the plaintiff at the date of the suit. Article 134 of the Limitation Act was relied on. The District Munsif dismissed the suit on the ground that the legal representative of the original mortgagee was not impleaded. On appeal, the Subordinate Judge differed from the lower Court, on this question and decreed the claim, holding that the suit was not barred by limitation. In second appeal, we called for a finding whether the father of the 3rd defendant had knowledge of the decree obtained by the plaintiff in 1885. The finding is in the negative.

We agree with the lower Appellate Court that the suit is not barred by limitation. It is true that the possession taken by the father of the 3rd defendant could have been perfected under article 134, as the property was sold to him by a mortgagee. But before 12 years were over, a new right accrued to the 3rd defendant. He became the heir to the property with the plaintiff in 1900. From the point of view of the plaintiff, he is entitled to say that when succession opened to him, a co-parcener of his was in possession and that that possession was not adverse to him unless and until he was excluded notoriously. If the 3rd defendant wanted to rely upon his right as a purchaser from the mortgagee, he should have put that forward to the knowledge of the plaintiff. There are not many authorities bearing on the question.

In *Tarubai* v. *Venkatrao* (1) Batty, J., says :—" In the second, when there has been no such ouster as to give notice of the adverse nature of the possession, it is incumbent on the person alleging that the title set up against him is barred by twelve years' adverse possession, to show, not only that his possession has lasted for twelve years, but that it has *all the time* been in open conflict with the title on which the plaintiff relies. The result is, as above indicated, if there has been no ouster or 'open and notorious act of taking possession', then the person relying on his possession to defeat title must show that it was of such a nature, and involved the exercise of rights so *irreconcilable with those claimable by the plaintiff*, as to give the plaintiff occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) *throughout the twelve years next preceding the suit*."

The language of Article 144 which speaks of possession 'becoming adverse' supports this view. Reference may also be made to *Asansab Ravuthan* v. *Vamana Rau* (2) and *Moidin* v. *Oothumanganni* (3). The decision in *Ponnusawmy Iyer* v. *Permaye* (4) is in favour of this position. There is no doubt that possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim. The difficulty in this case arises from the fact that possession was hostile when it commenced. We have not been referred to any authority which shows that such a possession continues to be hostile notwithstanding the accrual of a peaceful title before the completion of the adverse possession. Possession should be *prima facie* attributed to a lawful title; we think the third defendant on the death of the widow must be deemed to have held the property on behalf of the plaintiff as well.

The decision of the Subordinate Judge is right and we dismiss the second appeal with costs. Time for redemption is extended to three months from this date.

S. N./R. K.

Appeal dismissed.

(1) (1903) 27 Bom. 43.

(2) (1879-80) 2 Mad. 223.
(3) (1888) 11 Mad. 416.
(4) (1915) 26 I. C. 346

A. I. R. 1916 Madras 142

AYLING, J.

In re *Murugesa Naidu*—Accused—Petitioner.

Criminal Rev. No. 623 of 1914 and Criminal Rev. Petn. No. 529 of 1914, decided on 15th February 1915, from the judgment of 1st Class Magt., Tirupatur, dated 11th August 1914, in calendar case No. 45 of 1911.

(a) Madras District Police Act (24 of 1859) Ss. 45 and 53—Object of S. 53 is to impose bar of limitation and restrictions about notice in prosecution against public officers—Prosecution of constable for receiving illegal amount is not barred by 3 months—Scope of S. 53 stated.

The object of S. 53 of the Madras District Police Act, XXIV of 1859, is to impose a bar of limitation against actions and prosecutions against officers for acts done or purporting to be done in pursuance of their official powers, and to impose further restrictions on such proceedings in respect of notice, tender and costs. [P. 143, C. 1.]

The prosecution of a Police constable for receiving an unauthorised fee or recompense is not barred by limitation owing to the fact that the offence complained of was committed more than three months before the prosecution was launched. [P. 142, C. 2 & P. 143, C. 1.]

The words "under the provisions of this Act or under the general Police powers," occurring in S. 53 of the Madras District Police Act (XXIV of 1859) apply to the phrase "anything done or intended to be done" occurring in the same section, and do not qualify "actions or prosecutions against any person." 1 Weir 846 and 5 M. H. C. R. 466, Foll.

Criminal Revision Case No. 460 of 1898, diss. from. [P. 142, C. 2.]

(b) Practice—Criminal Trial—Adjournment for obtaining copies of deposition of prosecution witnesses refused—Held the accused was prejudiced and conviction cannot be supported.

An accused who had applied for copies of the depositions of prosecution witnesses to instruct a Vakil to cross-examine them, did not get the copies in spite of reminders. He applied for the adjournment of the case on the hearing day; but the adjournment was refused and he was convicted.

Held, that the adjournment had been improperly refused and that the accused had, in consequence, been gravely prejudiced thereby and had no fair chance of defending himself and that the conviction could, therefore, not be supported. [P. 142, C. 2 & P. 143, C. 2.]

S. T. Srinivasagopalachariar and *P. Ramkrishna Iyer*—for petitioner.

Public Prosecutor—for Government.

Facts.—A Police constable was prosecuted under S. 45 of the Madras District Police Act, 24 of 1859, for receiving an unauthorised fee or recompense, more than three months after its alleged occurrence. The accused pleaded not guilty to a charge framed against him, cross-examined one of the prosecution witnesses, but declined to cross-examine the rest without a Vakil. The case having been adjourned for defence evidence, he applied for certified copies of the evidence of prosecution witnesses to enable him to engage a Vakil and instruct him to cross-examine the witnesses. He failed to get the copies in spite of reminders and on the adjourned date applied for further adjournment, which was refused. The case was then proceeded with and the man was convicted. He thereupon preferred this criminal revision petition.

Order.—The petitioner, a Police constable, has been convicted by the Joint Magistrate of Tirupatur of an offence under S. 45 of the Madras District Police Act (Act XXIV of 1859) by receiving an unauthorised fee or recompense.

The first point argued on his behalf is that the prosecution is time-barred under S. 53 of the same Act, more than three months having elapsed between the commission of the alleged offence and its institution. The construction of this section is not altogether free from doubt; but, in my opinion, it does not apply to a case like the present one. The counsel for the petitioner contends that the three months limitation applies to all prosecutions for offences constituted by the Act: and he relies on an unreported decision by Boddam, J., in Criminal Revision Case No. 460 of 1898 (1). He would have the words "under the provisions of this Act, or under the General Police powers hereby given" read as qualifying the words "actions or prosecutions against any person." How any "prosecutions," to say nothing of "actions," can be said to be brought "under the general Police powers hereby given" it is impossible to understand; and Mr. S. T. Srinivasagopalachari has to admit that his interpretation makes nonsense of the second clause of the section regarding notice "to the defendant, or to the Superintendent or other superior officer." The reason for the following clauses is also difficult to conjecture on this view of the scope of the section.

If, on the other hand, the words "under the provisions of this Act or

under the General Police powers hereby given" be taken as applying to "anything done or intended to be done," then the section becomes perfectly coherent and intelligible, and its intention is obvious—to impose a bar of limitation against actions and prosecutions against officers for acts done or purporting to be done in pursuance of their official powers: and to impose further restrictions on such proceedings in respect of notice, tender and costs. The only obstacle to such a construction is the insertion of commas after the words "intended to be done" and "provisions of this Act." The second of these is certainly superfluous under any construction: and it seems to me more reasonable to disregard the first and view it as either superfluous or inserted by mistake than to adopt a reading of the section so irrational as that contended for by the petitioner's counsel. The view I am disposed to take has been taken apparently without hesitation by two Benches of this Court [Vide *High Court Proceedings, 7th July* 1869, *No.* 1211 (2) and *Gundam Venkatasami* v. *Chinnam Purushottama* (3):] and I must respectfully dissent from the ruling of Boddam, J., in the case relied on for the petitioner, I hold that the prosecution was not barred by S. 53 of the Police Act.

The conviction must, however, be set aside on another ground. The petitioner has, in my opinion, been gravely prejudiced by the procedure of the Joint Magistrate, and he had no fair chance of defending himself.

The hearing of the prosecution witnesses commenced as soon as the accused (petitioner) appeared or was brought before the Court on 30th July 1914. The accused, who was not represented by a Vakil, after pleading not guilty to the charge framed, cross-examined one witness and as is stated "declined to cross-examine the others without a Vakil." Whether the cross-examination of these witnessess was postponed or omitted does not appear: but the case was adjourned till 11th August 1914 for defence evidence. On 31st July 1914, the accused put in a petition for copies of the depositions of the prosecution witnesses and other documents to which he was legally entitled, for the purpose of engaging a Pleader and conducting the proceedings. On 3rd August 1914, not having received these copies, he filed another petition stating (in effect) that they were necessary to enable him to instruct a Vakil, and that in case they could not be granted him before the adjourned date, a further adjournment might be necessary. Finally, on 11th August 1914, he put in a third petition calling attention to the previous two, and stating that as he had still not been given the copies, he had been unable to "engage a Vakil and conduct the case." He, therefore, asked that the case should be adjourned and copies given him.

The Joint Magistrate refused the adjournment, called on the accused to examine his defence witnesses, and, as the accused professed himself unable to do so without a Vakil, closed the case without them and convicted and sentenced the accused.

In his judgment he does not refer to the copy petitions, but says "as accused is evidently trying to delay the case, without corresponding benefit, adjournments have been refused."

The learned Public Prosecutor is unable to suggest any reason why the copies for which the accused applied were not granted; or to explain the Joint Magistrate's procedure.

The accused's request for an adjournment on 11th August 1914 appears to have been quite reasonable. No doubt he might have engaged a Vakil, but without the copies applied for, he could not have properly instructed him. If, for whatever reason, the copies for which the accused had applied had not been given to him before the hearing on 11th August 1914, common fairness should have dictated an adjournment of the case, so that the accused might not be prejudiced in his defence.

I set aside the conviction and sentence and direct the re-trial of the petitioner.

It is brought to notice that the offence was committed within the limits of the Chingleput District. I direct that the petitioner be re-tried by the District Magistrate of Chingleput District or any subordinate Magistrate having jurisdic-

(2) (1868-69) 1 Weir 846.
(3) (1869-70) 5 Mad. H. C. R. 466.

tion to whom he may see fit to transfer the case.

S. N./R. K.

Conviction set aside ; *Re-trial ordered.*

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SPENCER AND PHILLIPS, JJ.

Kalianji Singji Bhai—Counter-Petitioner—Appellant.

v.

Bank of Madras—Petitioner—Respondent.

Appeal No. 62 of 1914, decided on 14th September 1915, against the order of Dist. Judge, South Malabar, in Insol. Petn. No. 7 of 1912.

(a) Provincial Insolvency Act (3 of 1907) Ss. 4, 12 and 51—Rule 21 (3)—Notice to agent of debtor of insolvency proceedings by creditor is sufficient—Agent's appearance amounts to waiver of objection to notice.

A notice of proceedings in insolvency instituted by a creditor served on the agent of the debtor, is as effectual as if served on the debtor himself. [P. 146, C. 1.]

Although clause (3) of R. 21 of the rules framed under S. 51 of the Provincial Insolvency Act, requires the notice to be served on the debtor himself by registered post, there is no express provision that it should be served only on the debtor. Where, therefore, an agent of the debtor gets notice of the proceedings and appears at the hearing he must be deemed to have waived any objection that he might have had to any supposed irregularities in giving the notice.

Minor, Ex parte, Pollitt, In re (1893) 1. Q. B. 455, Foll. [P. 146, C. 2.]

(b) Provincial Insolvency Act (3 of 1907), S. 4—Leaving place of business by agent is act of insolvency within S. 4—Debtor's personal act is not necessary.

For the purposes of S. 4 of the Provincial Insolvency Act, the act of an agent may be the act of the principal, and, therefore, where an agent departs from the place of business, it constitutes an act of insolvency on the part of the principal, though the English Law requires the act to be a personal act of the principal, *i.e.*, the debtor himself.

Blain, Ex parte, Sawers, In re (1879) 12 Ch. D. 522 ; *Cooke* v. *Ch rles A. Vogelar Co.*, (1901) A.C. 102 ; 2 Cal. W. N. 306 Foll. [P. 147, C. 1.]

(c) Contract Act (9 of 1872), S. 201—Where agent generally empowered principal's adjudication does not terminate agency—He can contest order of adjudication.

Where the power-of-attorney, under which an agent acts, empowers him to do other acts besides carrying on the trade and dealing with his property, his agency does not terminate immediately on the presentation of a petition for the adjudication of his principal as insolvent. It subsists to stave-off bankruptcy orders against his principal. [P. 147, C. 1.]

K. R. Subramania Sastri—for Appellant.

David, Brightwell and *Morseby*—for Respondent.

Order.—The circumstances in which the learned District Judge held that notice had been duly served on the debtor under S. 12 of the Provincial Insolvency Act are not clear. We must, therefore, call for a finding on the issues :

1. What notices were served on the debtor directly or on his agent Visram ?

2. What attempts to serve the former were made by registered letter or otherwise ? and was R. 21 (3) of the rules framed under the Act complied with ?

3. Was it found impossible to serve the debtor direct ? If so, what were the circumstances in which a valid service was effected on Visram ?

Fresh evidence may be adduced. The findings will be submitted within six weeks from the date of receipt of records. Seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of South Malabar submitted the following

FINDING.

* * *

* * *

* * *

1. It is admitted that no notice was served on the debtor directly. But I find that a notice was issued on the 6th December 1912 by the Court addressed to Hirji Visram Sait, *muktiar* of Kallianji Singji Bhai, sole partner of the firm of Rayasi Amerchand of Nagaram Amsom, Desam, Calicut *Taluq*, the address given in the insolvency petition of the counter-petitioner for the service of notice and processes. The copy of that notice was affixed to the outer door of the dwelling house of Hirji Visram, because he stated that he was unwilling to sign and accept the notice and that his principal should be added as a party.

2. It is proved by the evidence of Mr. Krishna Ayyar, Vakil engaged in the insolvency petition, that a registered letter (Exhibit H) was sent by petitioner's Vakil, Mr. Ramakrishna Ayyar, to

the insolvent Kallianji Singji Bhai intimating to him the fact that a petition has been presented and accompanied by a copy of the petition. This was addressed to Cutch, Mandavi and was returned by the postal authorities to the sender with the endorsement "Left. Particulars not known. Returned to the sender" for which the receipt being H2. I find that this was the only attempt made to serve the debtor.

With regard to the latter part of the second issue, I find that there was no compliance with R. 21 (3) of the rules framed under the Act, because as it appeared impossible to serve the debtor in person, the Court ordered on the 11th March 1913 that the notice given to the agent should be held to be sufficient with reference to rule 5 (2) of the rules under the Provincial Insolvency Act.

3. It appears from the fact that the notice sent to the debtor by post by the petitioner's Vakil was returned unserved and from the correspondence (Exhibits D, E. F and G) that the service on the debtor direct was impossible. It was not stated in the objection petition filed by Hirji Visram on the 11th March where the principal was. My finding on the first part of the third issue is consequently in the affirmative. With reference to the latter part of the 3rd issue, the *muktiarnama* (Exhibit J) under which the agent acts gives him sufficient authority to represent the debtor and the *vakalath* executed by him for the petition was in pursuance of it. The service and the notice already referred to on the agent was service sufficient under O. 3, R. 3, Civil Procedure Code, and O 5, R. 12, Civil Procedure Code, and with reference to R. 5 (2) of the Madras Insolvency Rules. I find, therefore, that in the circumstances stated valid service was effected on Visram.

This appeal against order coming on for final hearing after the return of the finding upon the issues referred by this Court on the 9th and 10th September 1915, and the case having stood over for consideration till this day, the Court delivered the following.

Judgment.—The appellant is the sole partner of the firm of Rayasi Amerchand carrying on a money-lending business at Calicut with a head office at Bombay. On December 3rd, 1912, the agent of the Bank of Madras, the respondent in the case, presented a petition to the District Judge to adjudicate the appellant insolvent and to appoint an *ad interim* Receiver. On December 6th a notice signed by the *Sheristadar* of the District Court (by order) went to the local agent to inform him that a petition to declare the appellant insolvent was posted for January 21st and that he might appear and show cause against it. The agent, Visram Sait, refused to receive the notice on the ground that his master should be made a party, and it was served on him by affixture. On December 7th a notice of the hearing together with a copy of the petition was sent by the respondent's Pleader through registered post to the appellant at Mandavi in Cutch, where he was thought to be residing, but it was returned to the sender as the addressee had "Left, Particulars not known." At the hearing on January 21st notice was ordered by the Court to go to the principal debtor for March 11th, but admittedly no further attempt was made to serve a notice of the date of hearing on the debtor in person as it was found impossible to do so. On March 11th the notice given to the local agent was declared by the Court to be sufficient, and on the same date the said agent filed in Court a counter-petition on behalf of the appellant describing himself as his *muktiar*. The proceedings were fully contested and ended on December 19th, 1913, in an adjudication of the debtor under S. 16 of the Provincial Insolvency Act as insolvent.

A number of objections have been raised to the sufficiency of the service of the notice on the agent and our attention has been called to the fact that the agent did from the first object to receiving notice for his principal.

These objections may be briefly answered by a reference to the provisions of the Provincial Insolvency Act and the rules framed under the authority of S. 51. S. 12 (3) provides that in cases where the petition is by the creditors, notice of the date for hearing shall after admission of the petition be served on the debtor in the manner provided for service of summons. S. 47 directs that Courts of Insolvency shall, subject to the provisions of this Act, follow the procedure followed in regard

to original civil suits. O. 5, R. 12, of the Civil Procedure Code declares that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. R. 13 allows service to be made on any agent who at the time personally carries on business or work for a person who does not reside within the Court's jurisdiction, in any suit relating to business or work. O. 3, R. 3 (*i*), makes service on a recognised agent as effectual as if it was on the party in person unless the Court directs otherwise. A recognised agent includes a person holding a power-of-attorney authorising him to make and do such appearances, applications and acts on behalf of such parties (O. 3, R. 2). Exhibit J, the power-of-attorney held by Visram Sait from the appellant, authorizes him 'to defend all suits, appeals and actions' in the Courts of this Presidency to which the appellant may be a party and generally to act for him and to do all things and acts that may be necessary and that the attorney may think fit for the complete discharge of his business effectually, completely and to his benefit; thus there can be no question that there was a valid service under the Civil Procedure Code on the appellant's agent, and that the Court declared it to be sufficient.

Turning to the rules framed by the High Court under S. 51 of the Insolvency Act, we find that clause 3 of R. 21 provides that notice of the date of hearing of an insolvency petition shall, if the petition is by the debtor, be sent by the Court by registered post to all creditors and if the petition is by a creditor, shall be sent to the debtor, not less than 14 days before the date of hearing. Notice was not sent to the debtor in this case by the Court through registered post, although the Bank's Vakil attempted vainly, as already mentioned, to communicate a notice and a copy of the petition to the appellant in a registered letter. As we read the rules, however, the sending of a notice by registered post is chiefly intended to provide for the information to be given to creditors on a petition by a debtor and to particularize the words 'such other manner as may be prescribed' in S. 12, clause (2) We are not aware of any practice of sending notices of the hearing to debtors through the post in the first instance upon creditors' petitions. Notice to debtors is otherwise provided for by R. 5, clause (2), and by the rules under the Civil Procedure Code. If a debtor gets notice of the hearing served on his authorized agent like a summons, he cannot reasonably complain that he did not also receive a similar notice from the Court through the post, and his objection might be answered by a reference to S. 99, Civil Procedure Code. Rule 5, clause 2, of these rules directs that a copy of an insolvency petition presented by a creditor shall be served together with the notice of the date for hearing 'on the debtor or upon the person upon whom the Court orders notice to be served.' It is not required that such an order should be in writing. In this case the notice was addressed to the agent and was signed by the District Court *Sheristadar* (by order). It was served under O. 5, R. 17, Civil Procedure Code, more than 14 days before the hearing on January 21st. Presumably this was a good notice to the agent, and as the agent appeared and filed a counter-petition on March 11th in which he did not raise any objection to the manner or time of service, he must be deemed to have waived any objection that he might have had to any supposed irregularities in the giving of notice.

So much for the question of notice. More substantial objections have been raised to the capacity in law of an agent to represent a debtor in insolvency proceedings, and to the capacity of a debtor to be adjudicated insolvent upon an act of insolvency committed by his agent. It is argued that as orders of adjudication relate back to and take effect from the date of the presentation of the petition on which they are made [*vide* S. 16, clause (6)], and as the agency of Visram Sait terminated under S. 201 of the Contract Act by his principal being adjudicated an insolvent, therefore, the agency must be taken to have ceased on the presentation of the petition; and that by the appointment on December 3rd of a Receiver, in whom the property of the debtor vested, the business of the firm could no longer be carried on by the agent and *ipso facto* his power-of-attorney became void. But it is evident from a reading of the whole of this section from clauses 2 to 6 that they all deal with the

property of the insolvent. This was made clear in the case of *Minor, Ex parte, Pollitt* In re (1), where in treating of the corresponding section of the English Bankruptcy Act, Lord Esher observed :

" The result of the relation back is, that all the subsequent dealings with the debtor's *property* must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed." The agent's power-of-attorney in this case empowered him to do other acts besides carrying on the trade and dealing with his property and one of those acts must be taken to be to stave off bankruptcy orders against the firm.

As regards the jurisdiction of the Courts to adjudicate persons insolvent upon acts of insolvency committed by their agents, there appears to be a difference in the law as it stands in England and in India.

In *Blain Ex parte, Sawers,* In re (2) it was held that an act of bankruptcy must be a personal act or default and could not be committed through an agent. This principle was followed in *Cooke* v. *Charles A. Vogeler Company* (3), another case ot a foreigner domiciled and resident abroad having business in England, but in both of these decisions it was conceded that if the law had been different the Courts would have had to take a different view.

In India it has been expressly enacted as an explanation to S. 4 of the Provincial Insolvency Act that for the purposes of that section which deals with acts of insolvency committed by a debtor, the act of an agent may be the act of the principal. It was accordingly held in In the matter of *Brijmohun Dobay* (4) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal.

In this case if the fact that the firm at Bombay of which appellant was partner had suspended payment, of which Mr. Lamb states that the agent gave him notice, be taken as the act of insolvency giving rise to these proceedings, there is no need to consider the effect of the agent's act as agent, as the suspension of payment at Bombay was the act of the principal, but if the suspension of payment by the branch at Calicut and the inability of the agent there to meet his bills in Calicut, to which Mr. Deane has testified, be taken into account, then we have no hesitation in applying S. 4 of the Act and in holding that the order of adjudication based on such an act of insolvency was a perfectly valid order. We agree in holding that an act of insolvency has been proved. We dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

(1) (1893) 1 Q.B. 455.
(2) (1879) 12 Ch. D. 522.
(3) (1901) A.C. 102.
(4) (1898) 2 Cal. W.N. 306.

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SPENCER AND COUTTS-TROTTER, JJ.

Ayyaperumalodayan and *others*—Defendants—Appellants.

v.

S. R. M. A. R. Ramasami Chettiar—Plaintiff—Respondent.

Second Appeals Nos. 1870 to 1936 and 2239 to 2241 of 1912, decided on 30th March 1915, from the decrees of Dist. Judge, Tanjore, in Appl. Suits Nos. 177, 641 to 665, 667, 668, 670 to 674, 681 to 689, 691, 693 to 699, 701, 702, 705, 706, 708, 709, 711, 713, 717, 720, 723, 725, 726, 728, 729, 730, 731, 174, 385 and 455 of 1911 respectively.

(a) Madras Estates Land Act (1 of 1908), S. 27—Presumption under S. 27 can be rebutted by showing that conditions did not conform with usage or agreement between the parties.

S. 27 raises a presumption that a *ryot* holds under the same conditions as in the previous revenue year: but that presumption can be rebutted by showing that these conditions were not in accordance with the agreement or usage prevailing between the parties. [P. 151, C. 2.]

(b) Madras Estates Land Act (1 of 1908), S. 26 (3)— *Pattahs* **at lower rate would not be binding on landlord's successor unless for making improvement.**

Under S. 26 (3) no *pattahs*, which have been granted by any landholder, at rates lower than the rates payable upon such lands or upon neighbouring land of similar quality and description, shall be binding upon his successor, unless *bona fide* granted for the purpose of making permanent improvements and unless the tenant shall have conformed to the condition upon which such lower rates were allowed.

[P. 150, C. 1.]

(c) Madras Estates Land Act (1 of 1908), Ss. 27 and 28—Presumption under Ss. 27 and 28 will not arise when previous year's rent is fixed *ex parte.*

The rule of law contained in Ss. 27 and 28 of the Act that the rent paid for the previous *Fasli* should be presumed to be fair, will not apply when it is fixed by an *ex parte* decision in which all the points upon which the parties were at variance were left open. [P. 150, C. 2.]

(d) Madras Estates Land Act (1 of 1908), Ss. 26, 27 and 28—Suit to compel to accept *pattahs* on *amani* system—Tenants denying rent in kind—Money rents found temporary—Original contract or usage must be adhered—When *waram* cannot be fixed for want of *data paimash* rates should be fixed.

Where in a suit brought by a landlord to compel his *ryots* to accept *pattahs* on the *amani* system, the tenants contended that they were entitled to be assessed at a money rate of rent and denied the usage set up by the plaintiff to pay rents in kind and it was found that the arrangement to pay money rents was a purely temporary one liable to be given up at any time if the *zemindar* preferred to go to the trouble of collecting his *waram*:

Held, that whether the rates were high or low either party was at liberty to revert to their original contract or usage, shown to have been merely in abeyance during the years when the rents payable from year to year were uncertain and when temporary arrangements prevailed. [P. 150, C. 2.]

When no *data* are available to fix the *waram* rates, the proper procedure is to adopt the *paimash* rate. [P. 150, C. 1.]

T. Rangachariar, K. V. L. Narasimham and *V. Narasimha Aiyangar*—for Appellants.

P. R. Srinivasa Aiyangar, T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar*—for Respondent.

Spencer, J.—These and other connected suits were brought under the provisions of S. 56 of the Madras Estates Land Act, 1908, by a landholder to compel his *ryots* to accept the *pattahs* tendered to them for *Fasli* 1318. In such suits it is the duty of the Revenue Court, under S. 57 of the Act, to determine what is a proper *pattah*. The proprietor claimed that a usage existed in this village to collect rents according to the *amani* system; in other words, that the *ryots* should give rents in *waram* which implies a division of the crop between the landholder and the *ryot* (*vide* S. 29 of the Madras Estates Land Act, 1908). To this the *ryots* rejoined that by a long standing custom they had been paying fixed money rents, and they denied the usage set up by the plaintiff to pay rents in kind. The question thus arose whether money rents or *waram* rents were the rents established by agreement or custom in this village.

The Deputy Collector who tried these suits found that the plaintiff had not proved that the rents contended for by him were the rents lawfully payable. He also found that the rents contended for by the defendants had not been proved to be the fixed money rents lawfully payable.

He then proceeded to discuss the plaintiff's contention that he had a right to revert to the *amani* system in the light of Act I of 1908, which he considered to have altered the law as laid down in S. 11 of the Madras Rent Recovery Act (VIII of 1865). This section provided that, if either party were dissatisfied with the rates determined by the Collector according to local usage or to rates paid for neighbouring lands, he might claim to have the rent discharged in kind according to the *waram*. There is no similar provision in the Madras Estates Land Act (I of 1908); but S. 27 of that Act declares: "If a question arises as to the amount of rent payable by a *ryot*, or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold at the same rate, and under the same conditions, as in the last preceding revenue year;" and the next section creates a presumption that the rent payable for the time being is fair and equitable, until the contrary is proved. Finally, the Deputy Collector decided that the proper rents payable for *Fasli* 1318 should be those decreed in the plaintiff's suit to recover rent for *Easli* 1317. The District Judge on appeal agreed with the Deputy Collector's findings of fact except as to the date up to which the *amani* system prevailed. In his opinion, there was evidence that it prevailed upto the year 1871, whereas the Deputy Collector found that it was not in force subsequent to 1868.

There are five periods of management to be considered in the history of this Sillathur *zemindari*. The first is the period between 1855 and 1867 when the estate was under the management of Rani Ammal; the second is the period between 1868 and 1870 when the Court of Wards were in charge; and the third is the period between 1871 and 1900 when Rangasami Pannikondar was the *zemindar*. During the fourth period of (1900-1905), the ownership of the estate was in litigation and a Receiver appoint-

ed by the Sub-Court was managing it. The fifth and the last period dates from 1905 when the present plaintiff came into possession by purchase. Whether the *amani* system lasted till 1867 or till 1870 is not of much consequence, so far as the date is concerned. The important matter is whether the payments of rent in money which the tenants made from time to time were really payments in lieu of *waram*, and whether that system had been entirely abandoned by the parties, or was in reality underlying all their relationships up to the date of suit. The District Judge held that the arrangement to pay money rents was a purely temporary one liable to be given up at any time if the *zemindar* preferred to go to the trouble of collecting his *waram*. This is a finding of fact which is binding on this Court in second appeal. Moreover, the observation of the District Judge that the rent payable under the periodical Settlement called *gadupattukkattu* was a provisional arrangement, appears to be sound. It is supported by the derivation of the word, and it has been shown that the payments varied according to the crops grown on the land, as disclosed by the evidence of defendants' witness No. 12 who says, "Every four or five years, the land is classified, the lower class being taken into the higher class and increased rentals levied. The higher class lands are never altered into the lower class." Defendants' witness No. 3 admitted that *gadupattukkattu* villages were those in which money rent was paid for a definite period *in lieu of the waram due* and Exhibit OI shows that Kottakadu was a *gadupattukkattu* village. Even the Deputy Collector found that the money rents payable were not fixed rents.

The District Judge also held that the Deputy Collector was wrong in basing his decision on the result of the suit for recovery of rent for *Fasli* 1317; and in this I think that the District Judge was clearly right. The *ryots* were *ex parte* in that suit. There was no adjudication on the question, what was a proper *pattah*; and in the plaint, the plaintiff reserved his right to have the question whether he was entitled to collect *waram*, determined in separate proceedings.

During the period under the Court of Ward's management (*Faslis* 1278 to 1280 corresponding to 1868 to 1870), the District Judge thinks that the *amani* system prevailed. He bases his decision on certain documents, Exhibits W, GG series, and B. An objection has been taken that Exhibit GG13 to which he refers does not relate to the village of Kottakadu, with which these appeals are concerned. From the appellants' 10th ground of appeal, it appears that the appellants took no objection to the admissibility of Exhibit GG13 but endeavoured to explain its effect away. But assuming that the District Judge was guilty of clerical error in referring to this particular Exhibit, which is of the year 1869, as a lease of 1868, he would not have been wrong if he had referred to Exhibit GG13, which relates to 1868. From the extent given in this document it is probable that Kottakadu lands were included. Even if this were not the case, the document would be relevant as evidence of usage prevalent in the neighbouring parent village, and it contains similar terms to those in Exhibit GG13.

It has also been urged that the last clause of Exhibits of this series which permits the landholder to appropriate the produce of the *ijara* lands towards the *ijara* arrears in accordance with the *amani* rules, is only a reproduction of the landholder's right to attach the crops of his tenants for default of payment of rent, as provided in S. 14 of the Act of 1865. But this does not seem to be so. There was no need to mention the *amani* rules in this connection.

It is further argued that the District Judge has misconstrued Exhibit W and that he was wrong in admitting Exhibit B as evidence that the *waram* rates prevailed in this period and the preceding period. Exhibit B is a *takeed* of 1869 which clearly refers to the difficulty in effecting a division of *waram* in the parent village of Venkarai. As regards Exhibit W, it relates to *Fasli* 1277 and to this village of Kottakadu and it contains an estimate of the gross outturn of the crops in the holdings of different *ryots*; and although stress is now laid on the absence of the evidence to prove for what purpose this document was prepared, the defendants' Vakil admitted in the lower Appellate Court that he could not suggest any other purpose besides a

division of produce. The genuineness of this document is not in dispute.

In the end, the District Judge, as there was no reliable oral evidence as to the correct *waram* rates, adopted the *paimash waram* rates. It does not lie in the mouth of the defendants, who contended in the District Court that, if any *waram* rates were to be taken, *paimash* rates were the correct rates, to say that the District Judge was wrong in so doing. They also conceded at the hearing of the suits that the *amani* system prevailed at the time of the *paimash* (1829-1830).

The real contention between the parties was on the question whether money rents or grain rents were payable; and on this point the District Judge's finding being one of fact is final, unless it can be shown that it is vitiated by an error in law or by there being no evidence to support his conclusion. In this case his findings are not based merely on the construction of documents.

It is next contended that the lower Appellate Court was wrong in introducing into these suits, which were tried under the provisions of the Madras Estates Land Act, a provision whereby either party, dissatisfied with the rates determined according to the local usage, was at liberty under the former Act to revert to the *waram* rates, and it is urged that the District Judge has wrongly applied S. 26 (3) of the Madras Estates Land Act, the provisions of which are prospective. This section merely provides that, if a landholder grants a lease of land at a rate lower than the lawful rate payable before the grant, his successor shall not be bound to adopt the same concession. In this respect, it is merely a repetition of the provisions of S. 11, clause 4, of the Act of 1865, that no *pattahs* which have been granted by any landholder at rates lower than the rates payable upon such lands or upon neighbouring lands of similar quality and description shall be binding upon his successor, unless *bona fide* granted for the purpose of making permanent improvements and unless the tenant shall have conformed to the conditions upon which such lower rates were allowed. This has been the law both before and after the passing of Act I of 1908. I do not think that the District Judge meant to base the landholder's right to have *waram* rates of rent upon this provision only. He found in his judgment that there was no permanent arrangement to pay money rents and the only alternative, therefore, was to go back to the *waram* system and this is all that his decision amounts to.

Mr. T. Rangachariar has pressed on our attention that no foundation was laid for the District Judge's assumption that the rates prevailing in these years were low rates. Whether they were high rates or low rates, either party was at liberty to revert to their original contract or usage if it has been shown to have been merely in abeyance during the years when the rents payable from year to year were uncertain and when temporary arrangements prevailed.

If the District Judge had allowed the plaintiff to exercise this option because it was the law laid down by S. 11 of Act VIII of 1865, he would have been wrong in making the repealed Act the ground of his decision, but he would have been right in principle under the circumstances of this case, because if there is a fundamental agreement between the parties it should be upheld in spite of temporary lapses sanctioned by mutual consent. This was the principle under which *Oliver* v. *Markanda Aiyan* (1) was decided, and in that case even 70 years of agreement to pay money rents for limited periods was not considered to give rise to a necessary implication of a contract to adopt money rents for ever. A similar view was taken by the Calcutta High Court in *Sohobut Ali* v. *Abdool Ali* (2). The period of transition in these suits was only about 40 years.

Mr. T. Rangachariar wished to make out a refusal on the part of the District Judge to apply Ss. 27 and 28 of the Madras Estates Land Act to the circumstances of this case. These sections only provide that a presumption will arise that a *ryot* is bound to pay rent at the same rate as he paid in the preceding revenue year, *until the contrary is shown*. When it has been shown, as in this case, that the rent paid in the preceding revenue year was fixed by an *ex parte* decision in which all the points upon which the parties were at variance were left open, and when there is a finding of fact that up to the present rate there has been no contract between the landholder and the *ryot* to pay a fixed money rent, this is equivalent to showing the

(1) (1891) 3 Mad. L. J. 263.
(2) (1899) 3 Cal. W. N. 151.

contrary of the presumption referred to in those sections. [Vide *Beni Pershad Koeri* v. *Raj Kumar Chowbey* (3), as to the value to be attached to the prior decision.]

If the *ryots* are still dissatisfied with the *waram* rates fixed in these suits, they have always a remedy provided in S. 40 of the Madras Estates Land Act of suing before the Collector to have their rents commuted into definite money rents. But the present suits have not been contested in such a way as to permit the equivalent of the *waram* rates being now determined in money. For this purpose, it would be necessary to have evidence as to the prices prevailing in the preceding ten years.

We dismiss the second appeal with costs. The memos. of objections are not pressed and are dismissed.

Coutts-Trotter, J.—As this is a matter of some little difficulty and doubtless one of great importance to the parties, I think it right to add my own reasons for our decision. There were a very large number of suits; a great quantity of documents was produced; numerous witnesses were examined and many points were discussed in the lower Courts. The Advocates are to be commended for having focussed the attention of this Court upon a single point, illustrated by only a few of the many documents exhibited.

These suits arose between the proprietor of the Sillattur *zemindari*, and his *ryots* in the village of Kottakadu in the *taluk* of Pattukottai. They were brought by the landlord to compel the *ryots* to receive *pattahs* and execute *muchilikas* in respect of their holdings in accordance with the provisions of Chapter 4 of the Madras Estates Land Act, I of 1908. The sole issue which we have to try is this: the landlord contends that his *ryots* must accept *pattahs* on the *amani* system, whereby the rent consists of a fixed portion of their produce; the tenants contend that they are entitled to be assessed at a money rate of rent, and that, therefore, the *pattahs* tendered are bad. In the view I take of the case, it is not necessary to decide the further question as to what that money rate should be.

The Act is neither very clear nor very well arranged; but I think the language of S. 59 illustrates the issue which the Courts below had to determine. That section provides that rent shall be payable in instalments according to agreement or in the absence of agreement, according to established usage; and on that analogy I think the *ryot* must accept a *pattah* the general conditions of which conform to such agreement or usage. S. 27 raises a presumption that a *ryot* holds under the same conditions as in the previous revenue year; but that presumption would be rebutted by showing that those conditions were not in accordance with the agreement or usage prevailing between the parties. It is obvious that the matters to be determined in the suits are ultimately questions of fact; and the determination of the lower Court can only be challenged in one of three ways. There may be no evidence to support the findings; or the learned Judge may have misdirected himself in law in the process of arriving at those findings; or it may be said that his findings of fact, while not open to such objections, do not warrant the conclusion which he has drawn from them. It is in this last way that the appellants' case has been framed; and it, therefore, becomes necessary to examine the judgment, and see exactly what it is that the learned Judge has found.

After a careful review of the somewhat troubled history of the *zemindari* in the light of such materials as were available to him, the learned Judge comes to the following conclusions:—

1. That up to the year 1871 the *amani* system prevailed in full force, and the rent consisted of a definite percentage of the produce.

2. That after that time the *ryots* succeeded in making the successive *zemindars* agree to take money and not produce as rent.

3. That the amount of such money payments were not fixed once and for all, but was altered every few years on the initiation of the *zemindar*, and was always altered in the direction of enhancement.

4. That every such alteration was preceded by an inspection of the lands and an estimate of their productivity.

Now so far as we have pure findings of fact and nothing more, they are amply supported by the evidence, and no serious attempt has been made to challenge them. From them the learned Judge has proceeded to draw these further conclusions: that the money payments from 1871 onwards were varied in accordance with the amount of the produce and must be regarded as being

(3) (1912) 17 I. C. 111.

made under the *amani* system, inasmuch as the essence of that system consists in taking from the *ryot* a contribution varying with the amount of produce; that the fact that the actual physical commodity taken was money and not grain was a mere matter of convenience to the parties; and that *pattahs* providing for payment of a fixed proportion of the produce must, therefore, be accepted by the *ryots*. For the *ryots* it is argued that though there may have been no fixed money rent, it is clearly proved that rent has been paid in money for the last 35 years, and that accordingly to give validity to a *pattah* on the *amani* system would be to disregard the outstanding feature of the usage obtaining between the parties. They further say that it is mere surmise to hold that the variation of the money rents paid was based on the proportion in force in the period before 1871, and that the estimates made of the productivity of the land may have been made for other purposes than the fixing of rent.

Mr. T. Rangachariar was, of course, faced with this difficulty: that when it came to fixing the amount of rent payable, the *pattah* would either have to be silent, or to prescribe such rent as the *zemindar* should choose or be able to exact. To avoid such an absurdity he points to Ss. 27 and 28 of the Act, and puts his case in this way: the evidence shows that a money rent was paid; its amount varied no doubt from time to time, but its variation was determined either at haphazard or by factors no longer ascertainable, and accordingly the presumption should take effect that the sum paid in the last revenue year was the proper one to enforce.

I do not think that this contention is sound. Mr. Rangachariar was quite unable to suggest any purpose for which the ascertainment of the produce of the land would be necessary or useful, other than this, one of fixing the rent. Rebuttable presumptions are guides to the ascertainment of the facts; it is an abuse of their true function to convert them into an excuse for evading that ascertainment. I think there was material on which it was open to the Judge to find that the payment in money from 1871 to 1909 was a mere incident which did not affect the principle upon which the payment was made, and that the tenure remained throughout an *amani* tenure. He has so found, in my opinion, not by way of mere surmise or conjecture, but upon a reasonable resolution of the probabilities of the case. That being so, we cannot disturb his conclusion, even if we would have arrived at a different conclusion had we been in his place. I think the learned Judge was mistaken in seeking to apply S. 26 (3), which, in my opinion, has nothing whatever to do with this case; but that misconception in no way affects or vitiates his essential findings. The second appeals fail and must be dismissed with costs.

S. N./R. K.

Appeals dismissed.

A. I. R. 1916 Madras 152.

COUTTS-TROTTER AND SRINIVASA AIYANGAR, JJ.

Akbar Hussain Sahib and *another*—Plaintiffs—Appellants.

v.

Shoukhah Begam Saheba and *others*—Defendants—Respondents.

Civil Appeal No. 311 of 1913, decided on 18th October 1915, from the decree of Tempy., Sub-Judge, Guntur, in Original Suit No. 17 of 1911.

(a) Mahomadan Law—Marriage—Nature and requirements of *Muta* marriage stated.

'*Muta*' is the lowest form of marriage known to Muhammadan law—so low as to be practically indistinguishable from concubinage. The two known features about it are, *first*, that there must be a definite period for the marriage to last either in this world or in the next or in both, and *secondly*, that a sum of money must be paid to the bride as her dower. [P. 153, C. 1.]

(b) Mahomaden Law—Succession—Only spurious children are incapable of inheritance.

None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. [P. 154, C. 1.]

(c) Mahomaden Law—Acknowledgment—Continued co-habitation does not raise presumption of legitimacy—Besides co-habitation and proof of parentage acknowledgment is required.

Mere continued co-habitation does not suffice to raise such a legal presumption of marriage as to legitimize the offspring, there must be, besides co-habitation and besides proof of parentage, something in the nature of acknowledgment, either expressed or by conduct, on the part of the reputed father or his family. [P. 155, C. 1.]

V. Ramesam, J. Janakiramayya and *A. N. Sitarama Sastri*—for Appellants.

T. Rangachariar and *T. Ramachandra Rao*—for Respondents.

Coutts-Trotter, J.—This is an appeal by two youths, who are the sons of a lady called Mahfil Nagir Bee. They bring this action against a number of relatives of the late Nawab of Masulipatam, as he was called by courtesy, to have it declared that they are the legitimate sons of the late Nawab, and entitled to take part in the partition of his landed property.

The question that has to be determined can be put in two ways. In the *First* place, has it been affirmatively shown that Mahfil Nagir Bee was a wife of the late Nawab ? *Secondly*, it may be put in another way—do the known circumstances of the relations of the Nawab and his family to Mahfil Nagir Bee lead to the presumption that a marriage must have taken place, though no definite date can be assigned ?

The first question, therefore, is one of fact—is it true or is it proved that a marriage actually took place between the Nawab and this lady ? If she was married to the Nawab, it is not contended that she was married in any other form except the lowest form of marriage known to Muhammadan Law, *viz.*, *muta* marriage, which is said by some to be so low a form of union as to be practically indistinguishable from concubinage. The two known features about it are :—*first*, there must be a definite period for the marriage to last either in this world or in the next or in both—which in this case is said to be 99 years and *secondly* a sum of money must be paid to the bride as her dower—and it is said in this case that a sum of Rs. 525 was paid to this girl. The history of Mahfil Nagir Bee is inevitably bound up with that of another lady, called Dildar Bee, who was a witness in this case. They were acquired from their parents, who were poor and unknown, by the senior wife of the Nawab, when they were little children six or seven years old. Their parentage seems to be very vaguely known to anybody, including themselves. They were apparently Hindus and *pariahs* by caste, and became converted to Muhammadanism after their introduction into the *zenana* of the Nawab. In the year 1887, the *shadi* wife of the Nawab was taken ill, and after a few weeks' illness. she died in child-birth. That we know to be on the 28th November 1887. The story told by the appellants is that shortly afterwards a few weeks after the death of the *shadi* wife —the Nawab proceeded in turn to contract *muta* marriages with both Mahfil Nagir Bee and Dildar Bee ; and it seems clear that more or less about the same time, he did no doubt contract a *muta* marriage with another young woman in the *zenana*, namely Fiza Bee. Several witnesses were called for the appellants to establish the alleged celeberation in Madras of the *muta* marriage with Mahfil Nagir Bee. Most of the witnesses identified the occasion by reference to some other events. One of the events by which some of them tried to fix it, is by reference to the marriage of a lady, called Amthus Salam Begam, who is the 5th defendant in this case. They say Dildar Bee and Nagir Bee's marriages were a little before that of Amthus Salam. But, unfortunately, the marriage register has been produced and it turns out that that marriage was not celebrated till the year 1892 ; and, therefore, these witnesses must, at any rate, be entirely mistaken when they imagined themselves to be consistent in fixing the occasion of the marriage of Mahfil Nagir Bee with reference to that of Amthus Salam Begam. Another method of identifying, adopted by some other witnesses, was by reference to the marriage of Fiza Bee, and those of them who adopted this method are all agreed that, of the three girls, Fiza Bee was the one married last. A letter which was produced—Exhibit XXXII—a letter written by the Nawab to a friend, is dated 17th April 1887, and it specifically recites that on that date, he had just married Fiza Bee as *muta* wife. After that, it becomes impossible to place any reliance on these witnesses, as it is clear on their own showing that it was more than six months out by this last method, and five years out by the other method of fixing it by the marriage of Amthus Salam Begam.

But, apart from these special difficulties, the general tenor of the story bristles with improbabilities. Although this took place in Madras, where the Nawab had a house and he was apparently very well-known in the society of his equals, every single witness that speaks to the marriage comes from Masulipatam having lived there all his and her life, as the case may be, and just happening by some happy coincidence to make a journey to Madras, in time to witness this ceremony. Not a single witness is called who was present on the occasion and who is a native of Madras. For this, the explanation is suggested that natives of Masulipatam would be the only persons whom the plaintiffs would probably be in a position to influence to invent the

story of the marriage. The learned Judge has heard all the witnesses and weighed all the documents and he has come to the conclusion that this alleged marriage is not proved to have taken place, and from that conclusion, I do not dissent.

Next comes the much more important question, whether, although it has not been specifically proved as at a definite date, the circumstances in this case are such that the law will presume that a marriage between these persons took place. I do not propose to deal with this matter at very great length; but we have had long and learned arguments about it; and out of respect to them, I will refer to some authorities that were cited. I refer to the authorities for the purpose of ascertaining on what conditions, what evidence and what proof rests the presumption which undoubtedly is to be found in Muhammadan Law with regard to legitimacy in certain cases. The first case is *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1). In that case, there was cited in argument a passage from Macnaghten's Muhammadan Law, and that was emphasised in the judgment. That passage is to this effect:—"None but children who are in the strictest sense of the word spurious, are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where by any possibility a marriage may be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void *ab initio*, the offspring of it will be deemed legitimate." Having quoted this passage, their Lordships say on page 318: "The effect of that appears to be, that where a child has been born to a father of a mother, where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place;" and on page 322, they summarise the state of facts, which they held in that case as sufficient to invoke the presumption of law, thus: "Now all the facts which are there stated, upon the principle of assumption, appear to us to be maintained by the evidence in this case; namely, that *Musammat* Raijan did associate with Fyz Ali Khan; that she did remain with the females of the house of Fyz Ali Khan; that Saadat Ali Khan was born of her *ventere* and as to his being the offspring of Fyz Ali Khan, we think that is a circumstance necessarily to be inferred from the previous facts."

The next case of importance was decided in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossein Khan* (2). In that case, their Lordships considered the earlier case and considerably modified the extent of the doctrine there laid down; and they cited a passage, which has been quoted at the Bar, from a certain book on Inheritance by Mr. Bailey as making the broad assumption that "mere continued co-habitation suffices to raise such a legal presumption of marriage as to legitimatize the offspring." This statement drops the important qualification with acknowledgment." I should mention that the word 'questioning' in the report is a mistake for 'making.' Their Lordships go on: "No decision can be found there (that is, of the Privy Council) which supports so broad an assumption, or which, when rightly understood, is in conflict with the law as stated by the Priests in this case. The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child. But this presumption follows the bed, and is not antedated by relation" and so forth. Then they go on: "These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the ground of legitimacy by confounding concubinage and marriage." Then they quote a passage from another case cited before us, *Mahomed Bauker Hossain Khan Bahadoor* v. *Shurfoon Nissa Begum* (3), and then they explain the passage in *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1) which I have already referred to, and they say this:—"The co-habitation alluded to in that judgment was continual; it was proved to have preceded conception and to have been between a man and woman co-habiting together as man and wife, and having that repute before the conception commenced; and the case decided that not co-habitation simply and birth, but that co-habitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The

(1) (1841-46) 3 M. I. A. 295.

(2) (1866-67) 11 M. I. A. 94 (P. C.).
(3) (1859-61) 8 M. I. A. 136 (P. C.).

presumption throughout the whole judgment is treated as one of fact.

"It would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and the text of the Muhammadan Law of legitimacy, as understood and declared by the High Priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case and the position contained in Mr. Campbell's judgment, that 'mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring;'" and, therefore, they adhered to the stricter view of the law which they had understood to be endorsed by the Muhammadan Priests, namely, that besides co-habitation and besides proof of parentage, there must be something in the nature of acknowledgment, either expressly or by conduct, on the part of the reputed father, to raise the presumption of legitimacy. But, given these facts, then their Lordships are ready to apply the presumption.

The next case of importance is *Ranee Khujooroonissa* v. *Musammat Roushun Jehan* (4). On page 311 they discuss the same question (under different circumstances) as is discussed in this case, whether a lady called Bibee Loodhun is a concubine or a wife. They say:—"It is an undisputed fact that Nuzeeroodeen, the son of Bibee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasion recognised by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances, appear to have been laid down in *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1), and then they quote a passage from that judgment; and their Lordships observe, on page 312:—"It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nuzeeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted." Then they discuss the evidence as to that and come to the conclusion that they are not justified in holding the presumption rebutted. That is quite consistent with the judgment of the Privy Council in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hussein Khan* (2), because in that case, there was evidence of acknowledgment not only by many members of the family, but by the alleged husband and father himself.

Approaching the facts of this case in the light of these decisions, what do we find? The plaintiffs' evidence is almost silent as to what happened to Mahfil Nagir Bee after the year 1887. She must have passed herself, so far as anything is known about her, either as a wife or a concubine of the Nawab. Plaintiffs, I suppose, elected to rely upon their story of a definite and specific marriage. The defendants' witnesses, when they were talking about Mahfil Nagir Bee at all, were only occupied in trying to make out a charge of adultery against the Nawab; and with regard to what took place inside the palace house of the Nawab, with regard to his treatment of the lady, with regard to his and anybody else's treatment of the children, we are left in almost entire darkness. A few sentences are laboriously picked out from the evidence of the witnesses, but they really amount to almost nothing. There is a statement by the eldest *shadi* son, Hussain Ali, in his deposition:—"Mahfil Nagir Bee and Dildar Bee were living with us at Madras, till my father's death." That is all that the learned Vakil for the appellants can pick out of the evidence which directly bears on the relations between these ladies and the Nawab, with one exception, and that is the evidence of Dildar Bee, the other lady, who is in the same position as Mahfil Nagir Bee, whose children are threatened with bastardy—and of course she has the strongest possible motive for making out the position as favourable to the appellants; further, she herself brought a suit on behalf of her children for exactly the same purposes as the present appellants bring this suit. Undoubtedly she says that they were treated by the Nawab as the children of his wives; because that is the plain meaning of the answer given in the examination-in-chief. That is all there is for inferring what took place between, let us say, 1887 and 1898 when the Nawab died. But there are some documents in the case which undoubtedly have a very material bearing on what conclusion we are to come to on this matter; because, although it may be difficult to act on the conduct of other members of the

(4) (1876-77) 2 Cal. 184=3 I. A. 291 (P. C.)

family without any evidence of recognition by the father, nevertheless, speaking for myself, if I find very strong and clear and consistent evidence of recognition by the other members of the family, I would be content to accept very slight evidence as to the father himself. It becomes necessary, therefore, to see how that matter stands. And the first document of importance, in my judgment, is the Government order of the 8th October 1900, which is Exhibit XI. What had happened was this. The family of the Nawab wished to have pensions allotted to them. He having himself actually got a Government political pension, his family were now anxious to get it ; and claims were put in to the Collector by the various members of the family, and finally a pension list was drawn up showing what share each was to get. In that petition to the Collector, it was stated quite clearly that the late Nawab had a *muta* wife, called Fiza Bee, and two concubines and children. The two concubines can only mean and do mean Dildar Bee and Mahfil Nagir Bee ; and in the schedule showing the amounts payable, they are, in terms, described as concubines and their children as children of concubines. It is not possible to say that Mahfil Nagir Bee must have so described herself and I do not think Mr. Rangachariar will go as far as that. But it is impossible for me to believe that the Collector would have written down a conclusion that there were two cuncubines, unless at any rate that was reflecting the view of the family generally. No doubt that certainly does not bind the children. I would even say that it is useless as indicating the ladies' own view of their position. But it indicates in the strongest way what must have been the general view of the family as a whole, so that we start with the very first document in the family endeavouring to explain her position and describing her as a concubine.

The next document of importance is Exhibit O, which is dated 23rd May 1902 and which is a power-of-attorney given to a trader for the purpose of getting him to manage some of the properties of the family ; and that document is very much relied upon by the appellants, because they are there treated as members of the family and as heirs to the Nawab. At the same time it is just to observe that there is a distinction made in the document between children of *muta* wives and a word, which apparently is capable of many meanings, the word *'kavaz'*. That word has been the subject of great discussion and considerable amount of research has been expended by the learned counsel in trying to see what it really means. I am not sure I am very much the wiser, but no one can read the document without seeing this—that there is a distinction between daughters of the *muta* wife and the children of somebody else. Let the other word be what it will, the distinctions drawn between the child of a *muta* the *shadi* wife and the *nicka* wife have already been mentioned and then it goes on to distinguish between children of the *muta* wife and children of the *kavaz*. It is very difficult to come to any other conclusion than that the last word must be intended to mean a woman who is not married at all ; and that, at any rate, is a possible meaning of the word *'khowas.'*

The next document to which I would refer is Exhibit 34, dated 27th May 1902. The family by this time were quarrelling, for the most part, with the eldest son, Hussain Ali, and approached the Governor with a view to get Hussain Ali out of the management of the family properties and place the management in the hands of somebody else on behalf of the family as a whole. The importance of that is that, in that document, although Akbar Hussain and Asghar Hussain are included as heirs or at any rate as claimants, they are described as being the minor sons, etc., by a concubine. Once more I do not for a moment suppose that can, in any way, be brought home to the knowledge of Mahfil Nagir Bee. The probabilities are that she is not in any way responsible, but the second son is responsible for it. But what I once more think it important for is that it does show that at this time the family or the spokes-man for the time being, of the family seemed to take it as a matter of absolute common denomination that her position was not that of a wife, but only of a concubine. I have already mentioned the fact that about this time when the memorial was sent, there was a quarrel between Hussain Ali and the other members of the family. There are some other documents on which great reliance is placed by the appellants. In the first place, a number of persons sued the descendants and representatives of the Nawab and added the present appellants as defendants along with the other members of the family ; and it is said that not only was that done—which perhaps

does not go for very much – but first the eldest son, Hussain Ali, and in later litigation, the senior daughter were guardians for these minors. That is a strong circumstance, so strong that, at one time, I was almost inclined on the faith of it to accept the appellants' cases. But I think it loses a great deal of its force by reason of two circumstances. The first is that when these documents are read with the other documents to which I have referred, a quite different view appears to be taken by the same people, and the plaintiffs are treated as sons of a concubine and nothing else. Still more do I think it greatly modified by the fact that this attitude begins to be taken up for the first time only after the dissensions and quarrels have arisen in the family. There is no doubt that various members of the family were on very bad terms with one another, and that the daughter who supported the two ladies' cases was ready to grasp at any support she could get from any member of the late Nawab's household. On the whole, I do not think that the evidence of subsequent recognition of legitimacy by the other members of the family is strong enough to outweigh the complete mystery in which the lives of these people are wrapped up and down to the end of the life of the Nawab ; and I think it quite unsafe to give the rein to mere conjecture and come to the conclusion that there is enough material to find that they are legitimate sons. I think it is unfortunate in some ways that the plaintiffs were ill-advised enough to stick to this most improbable story – which, I have already said, cannot be accepted—of a definite ceremony at Madras in November 1887 or thereabouts and so neglected to call evidence of what Nagir Bee's position was from 1887 onwards. The one person who was qualified above all others to give such evidence, the one person in the world who had the strongest interest for setting up a story of what took place, was Mahfil Nagir Bee herself and she was not called. I cannot really accept the suggestion thrown out regarding her being unable to give evidence from illness. No Judge would have wished to try this case in the absence of the evidence of Mahfil Nagir Bee, if she and her side had only pressed for an adjournment. I am convinced that any Court would have adjourned the case to any reasonable extent to get that lady's evidence if she was suffering from sickness There is nothing to show that any such application was made. In her absence, the appeal of the plaintiffs cannot succeed and the conclusion of the learned Judge must be upheld. The result is that this appeal is dismissed with costs.

Srinivasa Aiyangar, J.—I agree.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 157

OLDFIELD AND TYABJI, JJ.

Bommadevara Satyanarayana Varaprasada Rao Naidu—Defendant—Appellant.

v.

Dasika Sriramulu and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 689 to 693 of 1912, decided on 8th April 1915, from the decrees of Sub-Judge, Kistna, in Appl. Suits Nos. 34 to 38 of 1911.

(a) Contract Act (9 of 1872) S. 72 Water-cess recovered by *Zemindar* for Govt. at penal rate – *Zemindar* bound to include area of tenant in water free area—Suit for declaring water free grants and recovery of excess water cess—*Zemindar* held not liable—Tenant must prove benefit received by *Zemindar*.

Where the plaintiffs sued for a declaration in respect of a pre-Settlement *inam* that they were not liable to pay any water cess on the lands in their occupation and for recovering back the water cess levied from them at a penal rate on account of incorrect information given to to the Government by the *zemindar* who made the collection of the water rate on behalf of the Government:

Held, (1) that there was no cause of action against the *zemindar* on the ground that he was bound to include the plaintiff's land in the area allowed to him water free and that the plaintiffs could not make him liable for any excess rate they had to pay ; [P. 159, C. 2, P. 161, C. 2 & P. 165, C. 2.]

(2) that in order to get the benefit of S. 70 the plaintiffs should prove the extent of the benefit derived by the *zemindar*. [P. 165, C. 1.]

(b) Civil P. C. (5 of 1908), S. 11—Principle of *res judicata* stated.

Per *Tyabji, J.*—The doctrine of *res judicata* is based on the principle that neither the Courts nor the parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication. A I. R. 1914 Mad. 399, referred to. [P. 161, C. 1.]

S. Swaminadhan—for Appellant.

V. Ramesam—for Respondents.

Oldfield, J.—Plaintiffs-respondents are *ryots* holding under 3rd defendant-appellant—a *zemindar*, who represents 2nd defendant, now deceased. First defendant is the Secretary of State. Plaintiffs' case is that their holding is *mamool* wet *inam* and has always been held as such without payment of rent or water rate. So long as the *zemindar* made the collection of water rate on behalf of Government, there was as between him and Government no necessity to ascertain the identity of the *mamool* wet lands, since he could simply deduct the amount corresponding with their total extent from the total sum otherwise payable by him. When, however, before *Fasli* 1312 he abandoned the collection, an ascertainment of the *mamool* wet became necessary; and owing to the incorrect information, which 2nd defendant's servants gave, Government, represented by 1st defendant, collected water rate from plaintiffs, which they were not liable to pay, since their land was *mamool* wet. They sue to recover the payments made under protest for *Fasli* 1314. Their payments included not only the ordinary water rate, but also the penal water rate imposed in consequence of their having taken water without application.

The foregoing represents plaintiffs' case as stated in their plaint, its foundation as regards both the ordinary and penal water rate being given as against 2nd defendant as his tortious act in giving incorrect information to 1st defendant. The Court of first instance, however, in its judgment (after remand), dated 21st September 1910, treated the claim against both defendants as *res judicata* in circumstances to be referred to; and the lower Appellate Court, holding that there was no *res judicata*, treated it as based on S. 70, Indian Contract Act, observing that the "*zemindar* had the benefit of the water for the rest of his lands to the exclusion of plaintiffs' *inam*" and presumably meant that he had the benefit of plaintiffs' payment in consequence of the exemption of some part of the rest of his lands. It exonerated the 1st defendant, who is not a party to this appeal.

This, so far as the ordinary water rate is concerned, was a possible basis for the decision and may be regarded as covered by the very general issues framed. Moreover the grounds of appeal relating to the discrepancy between it and the pleadings have not been pressed as regards this part of the case. But, S. 70 being in question, 3rd defendant's objection that the finding of fact above referred to is not supported by, or has not been reached after consideration of, the evidence must be allowed. The Court of first instance, no doubt, after dealing with the case as one of *res judicata*, admitted all the evidence adduced, but it simply recorded its findings without discussion of it or reference to S. 70; and the lower Appellate Court found, as stated above, also without applying its mind to the evidence in detail and without attempting to decide whether it did or did not support its assumption that the *zemindar* had in fact been exempted from liability to an extent corresponding with the payment made by plaintiffs.

It is conceded that S. 70 cannot justify plaintiffs' claim in respect of the penal portion of their payment and that it must be supported as one for compensation for the result of 2nd defendant's improper conduct. Neither of the lower Courts has dealt separately with this part of the case. As regards it also there must be a remand for a finding on fresh issues.

The question is next, whether the dispute between the parties or any part of it is *res judicata*. The facts are that plaintiffs sued 1st and 2nd defendants in Original Suit No. 434 of 1903, on allegations similar to those now before us for (1) a declaration that their holding was *mamool* wet *inam*, (2) refund of water rate paid under protest for *Fasli* 1312. Reference to the decree in the printed papers in this Court shows (what Exhibit A, the judgment, leaves obscure) that both reliefs were granted against 1st defendant, but only the first against 2nd defendant, the suit against him for the second being dismissed without costs. This result was not affected by the appellate judgments, Exhibits B and CC, plaintiffs' memorandum of objection against 2nd defendant having been filed after Exhibit A had become final. In these circumstances Exhibit A is *prima facie* an adjudication in 2nd defendant's favour, if not as to the nature of the holding, at least as to his obligations in respect of it. Plaintiffs' argument is then that incidentally to this disposal of their claim the matter in

dispute was not heard or determined. They have not relied on the reasons adopted by the lower Appellate Court.

Firstly, as regards the nature of the holding, I have pointed out that the declaration claimed by plaintiffs was given against both defendants; and, though plaintiffs have not so far pleaded *res judicata*, the fact will be important, when the issues remanded are dealt with by the lower Appellate Court. At present the material facts are that, though Exhibit A, paragraph 17, contains the finding in plaintiffs' favour, it was expressed in paragraph 12 only as follows:—"Although I am prepared to find it proved that plaintiffs' holding is a wet *inam*, I think that it would be enough to find that the land is immemorial wet.....in other words, plaintiffs have an easement right by grant or prescription to irrigate these fields .....when, therefore, the Government agreed with the *zemindar*, etc., ...it should be taken to contract with him as representing all concerned, that the new source shall be subject to all their customary rights." This I understand to mean (1) that, though the land was *inam*, that fact and the possible responsibility of the *zemindar* for its irrigation were not material, because (2) it was *mamool* wet and entitled to receive water from Government on that ground. The Court adopted the second of these grounds and (perhaps because a decree against Government was considered by it a sufficient relief) refused to adopt the first as the basis of its decision.

The remainder of the judgment agrees with this,- since there is nothing in the ascertainment of the duties of the parties, which follows, inconsistent with the disposal of the case on the footing that land is ordinary *mamool* wet, not wet *inam* in connection with which the *zemindar* might be under special liabilities. Though, as stated, there is a finding in paragraph 17 that it is wet *inam*, the other finding, that the collection of water rate was wrong, relates only to the act of Government. In the circumstances the decision must be that the Court declined to adjudicate on 2nd defendant's conduct and that there has been no determination of the claim relating to it.

The result is that there must be a remand on the basis that the character of the land as *mamool* wet *inam* is *res judicata* against 3rd defendant in consequence of Exhibit A, against which 2nd defendant did not appeal. The following issues must be tried:—

1. Whether in consequence of plaintiffs' payment 2nd defendant was exempted from any liability for water rate and was benefited and (if so) to what extent?

2. Whether penal water rate was levied from plaintiffs in consequence of any wrongful or negligent representation to 1st defendant by 2nd defendant or his servants, and (if so) whether 3rd defendant is bound to compensate plaintiffs and to what extent?

3. To what reliefs are plaintiffs entitled?

Fresh evidence may be adduced. The finding should be submitted in six weeks from the re-opening of the Court. Seven days are allowed for objections.

Tyabji, J.—The plaintiffs are holders of land in the 2nd defendant's *zemindari* which, is a portion of the Nuzvid Estate. Their suit is against the Secretary of State and the *zemindar* (the 1st defendant and the 2nd defendant's representative respectively for a declaration that the plaintiffs are not liable to pay any water cess on the lands in their occupation, and for recovering back from the defendants the water cess levied from the plaintiffs at a penal rate.

It is not contended before us that the plaintiffs have any cause of action against the Secretary of State. For it is admitted the Government were entitled to recover from the plaintiffs the water cess, even though as between the plaintiffs and the *zemindar* no water cess may be due from the particular plots of land in the occupation of the plaintiffs. The lower Appellate Court has, however, decided against the *zemindar* and held that he is liable to refund the payment made by the plaintiffs.

It is argued for the *zemindar* in this appeal that the decree against him is erroneous, on the ground that there was no cause of action disclosed as against him, and that in any case the matter is *res judicata* between him and the plaintiffs. With reference to the later contention it is admitted that there were suits between the same parties in which the liability of the *zemindar* on the same

basis as in the present case was directly in issue. The lower Appellate Court held that the decrees in those suits did not operate so as to make the question involved in the present suits *res judicata* : " *First*, because the said judgments relate to different *Faslis i.e.*, the plaintiffs' claim for *Faslis* 1311 and 1312, which was prior to *Faslis* 1314 to 1318 ; and *secondly*, because the cause of action for the present suits is also different." The learned Pleader who appeared for the respondent did not rely upon these reasons for contending that the matter was not *res judicata*, owing to the decision reported in *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* (1).

The argument before us, however, was that in the previous suits, as a matter of fact, there was either no adjudication on the point at all, or, if there was, then it was in favour of the plaintiffs.

On referring to the records of the previous suits and appeals arising therefrom, it is found that the District Munsif in the Court of first instance decided the suits in favour of the plaintiffs : in doing so he purported " formally to record findings on the issues in favour of the plaintiffs." He seems to have considered the liability of 2nd defendant in the preceding paragraph of his judgment where he says, " on behalf of the 2nd defendant a curious argument was advanced.....The argument is advanced only for the purpose of this suit and is not *bona fide* ; " his decree embodied a declaration that the lands were *mamool* wet *inam*, which was a relief against the 2nd defendant also ; and he made the 2nd defendant bear his own costs, though the decree was otherwise only against the 1st defendant. Holding that the cess was not due on the lands, he held as a consequence that the plaintiffs were entitled to recover back the payments made by them. As the plaintiffs were not entitled to get the money twice over, and also perhaps because there was no question that if the Government were bound to re-pay the money they would re-pay it, his decree for re-payment of the cess was only against the Government who had actually received the payment.

From the Munsif's decree, that the lands in question were *mamool* wet, that the 1st defendant should refund the payments made by the plaintiffs, and that the 2nd defendant should bear his own costs, there were appeals and cross-objections. The Subordinate Judge in appeal said : " That being the case it is clear that as against the 2nd defendant plaintiffs are entitled to get water for their land free of charge. If the *zemindar*, who was bound to include the extent of the plaintiffs' holding within the 120 and odd acres allowed in his favour by Government for irrigation free of charge, failed to do so, the fault was his and it seems to me that plaintiffs must look to him for the redress of their grievances so far as the Government are concerned. I fail to see how they are to blame for charging water rate from plaintiffs, because it is not plaintiffs' case that they have entered into any engagement with the Government by which they are entitled to irrigation free of charge. Under these circumstances the first Court was not right in directing the Government to refund to plaintiffs the water rate collected from them. I decide on the first point that since 1839 the plaint land has been enjoyed as *mamool* wet *inam* exempt from water tax, but that the 1st defendant is not liable for plaintiffs' claim. I need not record any finding on the 2nd point, as the first Court had not made the 2nd defendant liable and the plaintiffs' memorandum of the objections in Appeal Suit No. 198 of 1901 asking for the 2nd defendant also being made liable was presented out of time. The plaintiffs were served with notice of Appeal Suit No. 198 of 1905 on the 9th December 1905, and their objection memorandum was filed in Court only on the 25th November 1906.

The decision of the Subordinate Judge was, therefore, that the plaintiffs were barred by limitation from asserting their rights against the 2nd defendant in the Appellate Court. There was a second appeal (Second Appeal No. 1735 of 1908) from the appellate decree and the second appeal was dismissed.

Apparently, therefore, the only questions that can be considered to have been decided by the Courts in the litigation culminating in Second Appeal No. 1735 of 1908 were (1) whether the

(1) A. I. R. 1914 Mad. 399=17 I. C. 445=37 Mad. 70.

Ist defendant was liable to refund the cess and (2) whether a decree for payment could be given against the 2nd defendant or whether the plaintiffs' cross-objections were out of time. The 2nd defendant's liability with reference to the previous *Faslis* was not really adjudicated upon : by the Munsif because in his view it was unnecessary, by the Appellate Court because the plaintiffs had not taken cross-objections in time. Giving its full force to the decision of the Appellate Court, we have no adjudication upon the points now arising.

Under these circumstances, to hold that the question of the liability of the 2nd defendant to refund the water cess in respect of the *Faslis* 1314—1318 is *res judicata*, would be a denial of justice based on a fiction which is directly at variance with the facts, and which is not based on the principle underlying the doctrine of *res judicata* : that principle for the present purposes may be stated to be that neither the Courts nor the parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication. It has been held that with regard to the previous *Faslis* the plaintiffs had forfeited the right to have their rights determined by the Courts. That is no reason why they should be placed under a similar disability in regard to the latter *Faslis*, though the reason for the forfeiture is absent. This is in accordance with the decisions of *Chunder Coomar Mitter* v. *Sib Sundari Dassee* (2), *Nilvaru* v. *Nilvaru* (3), *Gungabishen Bhagat* v. *Raghoo Nath Ojha* (4), *Balkishan* v. *Kishan Lal* (5).

The next question is whether the plaint discloses any cause of action against the 2nd defendant. The cause of action relied upon by the plaintiffs is as follows : —that the water cess which was levied from the plaintiffs was in fact due from other lands not in the occupation of the plaintiffs ; that the 2nd defendant wrongfully represented to the Ist defendant that the lands from which water cess could be levied included the plaintiffs' lands : that by reason of such representation the plaintiffs were made to pay the water cess though the lands in their occupation were not subject to the water cess ; and that the said other lands were exempted from payment of the tax, which would not have been exempted had the 2nd defendant represented the true facts. If all these facts are established by the plaintiffs then, it would seem that the plaintiffs have made payments which the 2nd defendant was bound to make, under such circumstances that the plaintiffs would be entitled to be compensated by the 2nd defendant under S. 70 of the Indian Contract Act. In the alternative the plaintiffs' case may be stated to be that they have been compelled to make payments for the 2nd defendant (not intending to do so gratuitously), the benefit of which has been that other lands in which the 2nd defendant is interested have been exempted from payment of the water tax : this benefit has been enjoyed by the 2nd defendant ; and in respect of it the 2nd defendant is bound to make compensation to the plaintiffs.

See *Wilson* v. *Glossop* (6) and *Mohendra Ghoshal* v. *Bhuban Mardana*. (7).

The plaintiffs, however, claim to recover back from the *zemindar* the whole of the water cess paid by them to the Government, and that was levied at a penal rate.

The question, therefore, will also have to be considered wheter the plaintiffs had any cause of action in respect of the sum which they had to pay as a penalty. That question would depend upon whether such extra sum can be considered to be damages arising out of the facts above referred to.

On none of these questions have the lower Courts given any express findings.

There are no findings on which we can proceed with reference to the questions—

(1) Whether the 2nd defendant represented to the 1st defendant that the land referred to in the plaint did not form part of the lands exempted from payment of water cess ; and if the answer to this question is in the affirmative.

(2) Whether the 2nd defendant obtained an exemption from payment of the water cess which would have been due on

(2) (1882) 8 Cal. 631.
(3) (1882) 6 Bom. 110.
(4) (1881) 7 Cal. 381.
(5) (1889) 11 All. 148.

(6) (1888) 20 Q.B.D. 354.
(7) (1911) 38 Cal. I=6 I.C. 810.

other lands had he not made the said misrepresentation.

(3) Whether the penal rate of water cess was levied from the plaintiffs by reason of any act or omission on the part of the plaintiffs themselves which they ought to have done or abstained from doing.

(4) Whether even if the misrepresentation above referred to had not been made by the 2nd defendant still the plaintiffs would have become liable to pay water cess at a penal rate ; and

(5) Whether if the 2nd defendant had not made the misrepresentation referred to in the first issue, then the penal rate of water cess would, in the events that have taken place, have become due from lands other than those referred to in the plaint, and would have been payable by the 2nd defendant.

It seems necessary, therefore, to send the case back for findings on the issues, which are mentioned in my learned brother's judgment.

In compliance with the above order of this Court, the Subordinate Judge of Kistna at Ellore submitted the following

Finding.—I am directed to submit my findings on the following issues :—

(I) Whether in consequence of plaintiffs' payment the 2nd defendant was exempted from any liability for water rate and was benefited and (if so) to what extent ?

(II) Whether penal rate was levied from plaintiffs in consequence of any wrongful or negligent representation to the 1st defendant by the 2nd defendant or his servants and (if so) whether the 3rd defendant is bound to compensate the plaintiffs and to what extent ?

(III) To what relief are the plaintiffs entitled ?

2. The plaintiffs Nos. 2 to 6 are the sons of 1st plaintiff It appears from the evidence of 1st plaintiff as P. W. No. 1 that no water tax was levied from him in respect of the suit *inam* prior to *Fasli* 1312. It is alleged on behalf of plaintiffs, and not denied by the 3rd defendant, that prior to *Fasli* 1312 the *zemindar* (2nd defendant) used to pay to Government (1st defendant) water cess on all the lands in the village of Rajupeta, after deducting 120 acres of *mamool* wet area. That the suit land of 11 acres 30 cents was also included in the said extent of *mamool* wet area is clear from Exhibit F, dated 16th November 1895. Exhibit F1 is an account prepared by the 2nd defendant's *karnom* for *Fasli* 1305 and bears the signature of the then Tahsildar. With reference to Exhibit F, the present Tahsildar as D. W. No. 1 deposed that the suit *inam* (land) is shown as *mamool* wet in Exhibit F1 and that no application for water is necessary in the case of *mamool* wet lands recognised as such by the Collector and the Board. Till *Fasli* 1312, it is conceded by the *zemindar* himself that no water cess was levied from plaintiff in respect of the suit land as it was treated as a part of the *mamool* wet allowed to the *zemindar*. In other words, the extent of the *mamool* wet area of 120 acres included the suit land which, however, was shown in the accounts of the *zemindar* as a *darimila inam* without *patta* (*vide* Exhibit DD and also Exhibit IV).

3. It is next seen from the accounts (Exhibits D, E, F, FI) that prior to *Fasli* 1312, the *zemindar* (2nd defendant) used to apply for water for the whole village of Rajupeta and was paying water tax to Government (1st defendant) on irrigated area in excess of the *mamool* wet of 120 acres including the suit *inam*. In other words, prior to *Fasli* 1312 the *zemindar* (2nd defendant) acted as agent of the Government (1st defendant) to supply water for the whole village and that in consideration thereof received a commission of 10 per cent. (*vide* paragraph 3 of the 1st defendant's written statement). But in *Fasli* 1312 the 2nd defendant having met with obstacles in the collection of water cess from the tenants put an end to his commission contract and relinquished water for the whole village. The 1st defendant accepted the relinquishment (*vide* paragraph 3 of 1st defendant's written statement).

4. Exhibits G and H as also Exhibit J show that in the suits (Original Suit No. 126 of 1895 and 1372 of 1896) brought by the *zemindar* against plaintiffs for the recovery of *gattuthumulu* and other dues for *Faslis* 1295 to 1305, the *zemindar's* claim was disallowed and the suits were dismissed on the ground that the land was granted as a rent free *inam* and that the *inamdar* was not liable to pay

gattuthumulu and other cesses. According to the evidence of D. W. No. 2, *gattuthumulu* of old is the same thing as water cess of the present day. Relying upon the Court's decisions evidenced by Exhibits G, H and J, the 2nd defendant in paragraph 4 of his written statement contended that if the suit land is an old *sarvadumbala inam* he has no concern whatever with it. In paragraph 6 of his written statement the 2nd defendant further contended that the suit land not being treated by Government as *mamool* wet, it was not open to plaintiff to get separately localized his *darimila inam* as part of the *mamool* wet allotted to the *zemindar*.

5. The plaintiff's case is that so long as the *zemindar* made the collection of water cess on behalf of Government, there was as between him and Government no necessity to ascertain the identity of the *mamool* wet lands, but that before *Fasli* 1312 when 2nd defendant abandoned the collection, it became necessary for plaintiff to apply to the Settlement Deputy Collector to localize the *mamool* wet and that accordingly he put in a petition before the Settlement Officer on the 17th November 1901. This petition has been filed on defendant's behalf as Exhibit XIV (*a*) which shows that because the *zemindar's* officials wanted to exclude the suit *inam* from the extent of *mamool* wet allowed for the village, the plaintiff applied to the Deputy Collector to include his land in the extent of *mamool* wet allotted to the *zemindar*. Exhibit GG, dated 13th January 1902, is a certified copy of 1st plaintiff's statement in the matter of the *mamool* wet enquiry held by the Deputy Collector, Mr. P. Nageswara Rao (D.W. No. 2). Exhibit GG read along with Exhibit XIV (*a*) shows that the *zemindar* was claiming the suit land as being included in the *mamool* wet under the head "*seri*" and that, therefore, 1st plaintiff requested the Deputy Collector to separately localize the *darimila inam* as *mamool* wet. Exhibit HH, dated 14th January 1902, contains the *zemindar's* protest to the effect that the suit land cannot be converted into *mamool pallam* (wet), because it was a *darimila inam* and registered as such in the accounts of the estate. The Deputy Collector's order is evidenced by Exhibit FF, dated 5th February 1902, and it is to the effect that as the *zemindar* protests against the separate localization, the petitioner's (1st plaintiff's) request cannot be complied with. In other words, the 1st plaintiff's request for separate localization was refused by the Deputy Collector (D. W. No. 2) in consequences of the 2nd defendant's protest contained in Exhibit HH, dated 14th January 1902. The question then arises whether 2nd defendant was justified in protesting against the separate localization of the plaintiff's land? The Deputy Collector (D. W. No. 2) states in his deposition before this Court that if at the time of the settlement the *zemindar* instead of protesting had asked him (D. W. No. 2) to include the suit land as *mamool* wet, he would have done so *only if it was a darimila inam*. But the *zemindar's* contention that the suit land is a *darimila inam* and that plaintiffs were liable to pay water-cess in respect of the suit land, was found to be not true in Original Suit No. 126 of 1895 and 1372 of 1896 and this finding was confirmed in Appeal Suits Nos. 238 and 240 of 1899 (*vide* Exhibits G and H). Exhibit G shows that 1st plaintiff, who was defendant in the said suit, pleaded *inter alia* that the suit land was not a part of the *zemindar's seri* land but is a *sarvadumbala inam* granted to plaintiff's ancestors by defendant's ancestors prior to *Fasli* 1200. This plea of plaintiffs was upheld both in the Court of first instance and also in the Appellate Court (*vide* Exhibits G and H referred to above). The question as to the character of the suit land being *mamool* wet and that it is a pre-settlement *inam* as alleged by plaintiffs and not a post-settlement *inam* as contended by defendants Nos. 2 and 3 has, therefore, become *res judicata* between plaintiffs and defendants Nos. 2 and 3. Such being the case, it was not open to 2nd defendant in the face of the above-mentioned finding to contend that the suit land was a *darimila inam* before the Deputy Collector, at the time of the *mamool* wet settlement enquiry by him in 1902. No doubt the 2nd defendant's contention was wrong with reference to the decisions evidenced by Exhibits G and H referred to above. But the real point is whether 1st plaintiff was right in asking the Deputy Collector to localize the suit land as part of the *mamool* wet allotted to the *zemindar* under the head *seri*. This was in effect the prayer of the plaintiffs in Exhibit XIV (*a*). The answer to this is

furnished in paragraph 5 of 2nd defendant's written statement. The 2nd defendant's answer is that inasmuch as the suit land was decided to be an old *sarvadumbala inam* in the litigation set forth in paragraphs 6 and 10 of the plaint, the plaintiffs have no right to include the suit land in the extent of the *mamool* wet allotted to *zemindar*. In other words, the suit land having been declared to be a pre-settlement *inam* by the Civil Courts, it was not open to plaintiffs to treat the same as *darimila* or post-settlement *inam* and include it in the *mamool* wet area allotted to the *zemindar*. The proper course open to plaintiffs was to ask the Collector to *determine* the suit land as *mamool* wet and to obtain a title-deed immediately after the result of the litigation evidenced by Exhibits G and H.

6. With reference to the observations made in the foregoing paragraphs, I proceed to record my findings on the issues 1 and 2 upon the evidence now adduced after remand and also upon the evidence on record before remand. The payments made by plaintiffs are evidenced by Exhibit AA series which relate to *Faslis* 1312 and 1313. In the present case, the *zemindar* (2nd defendant or 3rd defendant) had no interest in the suit land at the time of plaintiffs' payment. This is clear from Exhibits G, H and J (*vide* also Exhibit CC . The liability under S. 1 of the Irrigation Cess Act (VII of 1865) is on the suit land. The suit land belongs admittedly to plaintiff. The plaintiff's case has been all along that the suit land is a pre-settlement *inam*, while 2nd defendant's contention was that it was a *darimila* or post-settlement *inam*. As between plaintiff and 2nd defendant it has been held that the suit land is a pre-settlement *mamool* wet *inam*, and not a *darimila inam* (*vide* Exhibits G and H). No doubt the suit land, although decided by the Court to be a pre-settlement *inam*, the title-deed in respect of it was issued to plaintiff only in 1911. The delay in the issue of the title-deed was wholly attributable to plaintiff's negligence. The 1st plaintiff's explanation in Exhibit XIV (*a*), dated 17th November 1901, was that because he was a minor and because nobody represented him at the time of the *inam* commission enquiry in 1866, it was not possible for him to get the title-deed. In Exhibit GG, dated 13th January 1902, the 1st plaintiff's explanation was that although he had attained majority he did not make any attempt to get the title-deed. And in Exhibit C, dated 7th February 1905, the 1st plaintiff stated that his co-sharers obtained title-deeds but he did not, because he considered it unnecessary. The conduct of 1st plaintiff, as evidenced by Exhibits XIV (*a*), GG and C, clearly shows that he was not anxious to obtain a title-deed although the suit land was declared to be a pre-settlement *inam*. The fact that on the strength of the description of the suit land as *darimila inam* in Exhibits XIV (*a*) and GG the 1st plaintiff wanted to get it localized as wet and included in the *mamool* area of 140 acres allotted to the *zemindar*, lends support to the respondent's counsel's argument that the 1st plaintiff remained quiet without obtaining a title-deed because he wanted to avoid payment of the quit-rent. For after the suit land was declared to be not a *darimila inam*, there was no obligation on the part of the *zemindar* to apply for water on behalf of the *inamdar* of the *ryots* in the village (*vide* the evidence of D. W. No. 2). In other words, it was no concern of the *zemindar* to see to the supply of water for the suit land which was declared to be a *mamaool* wet pre-settlement *inam*. The plaintiff's case, as disclosed from the evidence of P. W. No. 1, is that the water tax for *Faslis* 1312 and 1313 was really payable by the *zemindar* (2nd defendant), *first*, because the suit land was wrongly excluded by him from the list submitted by him to Government and *secondly*, because the *zemindar* was benefited by reason of some other land of his being substituted for the suit land. As regards the first reason, neither the original list submitted to Government nor a copy of it has been produced. No doubt Exhibit VIII, as deposed to by D. Ws. Nos. 1 and 2, was in substance a relinquishment application for supply of water in respect of the suit land and certain other lands mentioned in Exhibit VIII. This application was put in long after the decision evidenced by Exhibits G and H as admitted by plaintiff, and it is argued for the respondent that 2nd defendant acted rightly because he had no concern with the suit land after the Courts found it to belong to plaintiff as a pre-settlement *inam*. In

other words by Exhibit VIII, the 2nd defendant put an end to his commission contract to supply water and put in a relinquishment application. The Government (Ist defendant), having accepted the relinquishment, called for water applications from Ist plaintiff (and other *ryots*), because there was no engagement between plaintiffs and Government in respect of the suit land which ceased to belong to the *zemindar* as his *darimila inam*, according to the decisions evidenced by Exhibits G and H referred to above. Next as to the second reason, that the *zemindar* has been benefited by virtue of some other land being substituted for the suit land, the 1st plaintiff's answer in his cross-examination is that he cannot say what that land is. According to the evidence of D. W. No. 3 the subsequent enfranchisement of the suit land in favour of plaintiffs as a *mamool* wet *inam* would not affect the 2nd defendant's *mamool* wet, because the suit land has changed its character. It cannot, therefore, be said that either S. 69 or 70 of the Contract Act has any application to the facts of this case. S. 69 cannot apply, as the *zemindar* was not legally bound to pay the water cess. And S. 70 cannot apply as the plaintiff, who paid the water cess, did so on his own account and not on behalf of the *zemindar*. It cannot, therefore, be said that in consequence of the plaintiff's payments the 2nd defendant was exempted from any liability for water and was benefited. In other words, I find the 1st issue in the negative and against plaintiff.

7. With regard to the 2nd issue, penal water rate was levied from 1st plaintiff because he persistently refused to apply for water in *Faslis* 1312 and 1313. The 1st plaintiff had to pay the penal water tax because he failed to get the suit land determined as *mamool* wet, as required by R. 6 at page 4 of the Board's Standing Orders, Vol. II (Appendices). There was no wrongful or negligent representation to the 1st defendant by the 2nd defendant or his officers in putting in the relinquishment application as per Exhibit VIII. Under Exhibit VIII the *zemindar* ceased to be the agent to supply water to the *inamdar* and *ryots* in the village and they were called upon to make their own arrangements. There was nothing to prevent plaintiffs to make their own arrangements. The plaintiffs had three years' time between the date of Exhibit VIII and the date of the first payment, as per Exhibit AA. It follows, therefore, that plaintiffs' paying the penal assessment cannot be said to be the result of the *zemindar's* relinquishment as per Exhibit VIII. Even supposing it were so, I hold upon the evidence that the act of 2nd defendant, as evidenced by Exhibit VIII, was not a wrongful or negligent representation to the Ist defendant by the 2nd defendant and that, therefore, 3rd defendant is not bound to compensate the plaintiff. I find the 2nd issue also in the negative.

8. It follows from my findings on the Ist and 2nd issues that plaintiffs have no cause of action as against 2nd or 3rd defendant and that, therefore, are not entitled to the relief sought with reference to the 3rd issue, which I find likewise in the negative.

These second appeals and the memorandum of objections coming on for final hearing after the return of the findings of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

Judgment.—It is now found that the plaintiffs' land is a pre-settlement *inam*. The finding cuts at the foundation of the plaintiffs' case. The appeals must be allowed and the plaintiffs' suits dismissed with costs throughout. The memoranda of objections are also dismissed with costs.

S. N./R. K.

Appeals allowed ; Suits dismissed.

A. I. R. 1916 Madras 165

SADASIVA AIYAR AND TYABJI, JJ.

Hussain Saib and *others*—Defendants—Appellants.

v.

Hassan Saib (*Plaintiff*) and *others*—Defendants—Respondents.

Civil Appeal No. 90 of 1911, decided on 11th August 1915, against the decree of Dist., Judge, South Canara, in Original Suit No. 6 of 1910.

(a) Mahomadan Law—Younger was joined in trade acquired separately—Document in 1845 that younger brother was to get 1/8—Brothers continued joint in trade and living—Large property was acquired afterwards—Younger brother predeceased elder—Sons and heirs continued joint in trade and lived together—In suit

for partition—(Per Sadasiva Aiyar, J.)—It was held that the whole property was equally divisible among both branches—(Per Tyabji, J.)—Younger brother's heir to get 1/8 in properties acquired before 1845—Property acquired after younger brother s death and upto elder brother's death was to go to elder's family rest to be equally divided among both branches.

Prior to 1845, one Haji Hassan, a Muhammadan belonging to the *Navayat* community and trading separately on his own account, associated with him his younger brother, Hammed, in the trade. In 1845, on the eve of his departure to Mecca, he executed a document whereby, in the event of his not returning from his pilgrimage, he directed that Hammed should get one-eighth of his properties. Hassan returned from Mecca in 1848 and till 1866, when Hammed died, the two brothers lived together and traded together. Their relations were very cordial, Hammed's son marrying Hassan's daughter. Hassan died in 1870. During the life-time of the brothers properties were acquired indiscriminately in the name of either. Till 1910, the descendants of the two branches of the family lived together as if they were members of an undivided family and trade was carried on as usual, the accounts standing in the name of one or the other of the representatives of the branches who happened to manage the trade for the time being. In 1910, the present suit was instituted by the members of the younger branch against the members of the elder branch for a partition. It was conceded by the defendants that Hammed and his heirs were entitled to one-eighth of the properties covered by the document of 1845:

Held, per *Sadasiva Aiyar*, *J.*, (*Tyabji*, *J.*, dissenting). That all the properties ought to be equally divided between the heirs of the two branches of the family, inasmuch as from 1848 till the date of suit, the two brothers, their heirs and the heirs of their heirs had acted in such a manner as to show that they had all understood their rights as following from the properties being held in common ownership between the two branches for more than 60 years and the imperfect understanding or agreement between the two brothers which began in 1848, had become fully perfected by their own conduct and the conduct of their heirs. [P. 185, C. 1 & 2.]

Per *Tybji*, *J.*—That Hammed and his heirs were entitled to one-eighth of the properties mentioned in the document of 1845, the remaining seven-eights of the suit properties and all other properties acquired prior to 1870 belonging exclusively to Haji Hassan and his sons, and that the properties acquired after 1870 must be equally divided amongst the heirs of Haji Hassan and Hammed in accordance with Muhammadan Law. [P. 171, C. 1 & P. 173, C. 1.]

(b) Mahomadan Law—Joint family—Incidents of a family living jointly and acquiring property jointly stated—Difference between Hindu and Mahomedan joint family pointed out.

The term 'joint family', when applied to parties governed by the Muhammadan Law of succession, presumably refers to a group of persons belonging originally to one family and living together without having partitioned such property as they have inherited from some common ancestor. Their continuing so to live, does not make their status different from what it would have been, had they not done so. Nor does the fact that they have not partitioned the property in any way, affect their rights therein or the legal incidents applicable to the property. No person can by birth derive an interest in the property belonging to his father during his life-time. The members of the group of persons so living together, do not form any legal unit. They are not necessarily heirs of one another. Property acquired by one of them does not necessarily form the property of the whole group. The group as constituted at any particular moment, is not the legal representative or the continuous successor in law of the persons who constituted the group in a previous generation. The result of this is that it cannot be said that all the property which at any time in the past belonged to the group as a whole, continues to belong to the persons now included, whether arbitrarily or according to agnatic descent, in the group. Membership of the group does not necessarily imply that a member has any share in all the property possessed by each of the other members, or kept in the possession of some person as the manager on behalf of all the group, whether such possession is held at their request or with their consent or merely with their acquiescence [P. 174, C. 1.]

Unlike under Hindu Law, under Muhammadan Law the mere fact that one person allows another to live with him and treat him as though he were a co-owner with himself of property which is shown initially to belong to him alone, cannot make the other a co-owner, though, if the origin and ownership of the property is not traced and it is not known which of them is the owner, such circumstances may raise a presumption of co-ownership. [P. 175, C. 1.]

(c) Mahomadan Law—Applicability—Mode of living does not affect applicability of law.

The mode of living adopted by parties, cannot affect the law to which they are subject.
[P. 175, C. 2.]

(d) Mahomadan Law—Co-owners—In absence of agreement expenses of maintenance are to be borne from their shares even though living joint.

In the absence of any agreement to the contrary, express or implied from the conduct of the parties and their mode of life in any particular case, co-owners of property under Muhammadan Law, even if they live together, are expected to pay for their maintenance and other expenses out of their own shares in the property held in co-ownership. [P. 176, C. 1.]

(e) Mahomadan Law—Joint-property—There is no ancestral property—Though property acquired by joint funds may be—Some joint property acquired by help or what may be called ancestral does not become ancestral.

Under Muhammadan Law, property acquired with the aid of what would be called 'ancestral property' according to the Mitakshara Law, does not become 'ancestral,' though acquisitions by co-owners with the aid of property held in co-ownership, do accede to that property.
[P. 176, C. 1 & 2.]

(f) Custom—It connotes rules of conduct as affecting rights and liabilities—Modes of living are not customary rules.

The word 'custom', in its legal sense, necessarily connotes only such rules of conduct as affect rights and liabilities. The ways of living or the observances of a particular class of persons do not become customary rules of law merely because evidence of such ways and observances has to be adduced for the elucidation of the facts existing in any particular case. [P. 177, C. 2 & P. 178, C. 1.]

(g) Hindu Law—Joint family—Firm—Contract act applies but it is subject to peculiar doctrines of joint Hindu family—Contract Act applies in absence of contract to the contrary—And existence of such contract will be presumed where inconsistencies would result.

Though the provisions of the Indian Contract Act, 1872, are applicable to a Hindu family firm as well, yet in respect of such firms the incidents of the Act are affected by the peculiar doctrines of the joint Hindu family, which are impliedly incorporated in the law of Hindu ancestral firms. [P. 178, C. 2.]

The cases regarding Hindu family firms only lay down that, in the absence of a contract to the contrary, the Indian Contract Act must be presumed to govern the relations between the members of such a firm and that the contract to the contrary may be an implied contract, which may even be presumed from the mode of life resulting from the general personal law of the parties, especially when not presuming such an implied contract, would bring about inconsistencies and results not contemplated by the parties. [P. 178, C. 2.]

(h) Contract Act (9 of 1872), S. 241—S. 241 directly applies to Mahomedan firms—As contract to contrary will not be presumed and as their personal law does not affect.

In the case of Muhammadans, S. 241 of the Indian Contract Act, 1872, has a direct operation, as in their case there is no contract to the contrary nor does their personal law operate so as to make them partners to any extent or otherwise to minimise the effect of the section on their rights. [P. 179, C. 2.]

(i) Mahomadan Law—Custom—*Navayats*—(Per Sadasiva Aiyar, J.)—Many incidents of Hindu joint family apply to *Navayats* by custom—Survivorship right by birth, exclusions of females from succession does not apply to *Navayats*—Hindu Law in other respects applies—Though two *Navayats* families living and trading together cannot be called undivided family yet the analogy of joint family trade applies.

Per *Sadasiva Aiyar, J.*—Many of the incidents of Hindu joint family system obtain by custom among the *Navayats*. [P. 182, C. 1.]

Except that the principle of survivorship and that of right by birth as well as that of exclusion of females, are inapplicable in considering the rights and liabilities of the persons on whom the business of a *Navayat* family has descended as heirs, in other respects, the principles and considerations applying to the business of Hindu family firms, are applicable to the business carried on by a *Navayat* family. [P. 184, C. 1 & 2]

Though the term 'undivided family' cannot properly be used to designate the relationship of the families of two *Navayat* Muhammadan brothers living together and trading together, yet the analogy of the business of a joint Hindu trading family is applicable to such a family. [P. 184, C. 2.]

K. Srinivasa Aiyangar and *B. Sitarama Rau* – for Appellants.

K. Narain Rau, *G. Annaji Rau* and *H. Balakrishna Rau*—for Respondents.

Tyabji, J.—This appeal arises out of a suit which has been referred to as a suit for partition. In reality, its subject-matter consists of what might have given rise to sereral suits for partition, for administration and perhaps for dissolutions of partnership, relating to the estates of persons who lived and carried on business in the beginning and middle of the last century.

It is not disputed that the parties are governed by the Muhammadan Law of succession and inheritance. Whether their mode of life will affect the law applicable to the property acquired or inherited by them, is one of the many questions that will have to be considered.

I will deal in the first instance with the history of the family; and will then consider the rights of the parties in the circumstances and events that are proved.

In referring to the names of the parties, I shall try to adhere to the same corrupt form which the parties themselves seem to have adopted.

One Shavaki Abdul Rajack is admitted to have been the common ancestor of the parties chiefly concerned in this litigation. Shavaki Abdul Rajack had four sons: (1) Shiddi Bave; (2) Ismail Sahib; (2) Haji Hassan and (4) Hammed Saheb.

The parties to these proceedings are mostly the descendants of (3) and (4). The plaintiff is descended from the fourth of these, Hammed, and the contesting defendants Nos. 9 to 13 are descended from the third, Haji Hassan. They may be referred to as members of the younger and elder branches respectively. On the 10th of March 1818 the four sons of Shavaki Abdul Rajack effected what is referred to as a partition. Exhibits VI, VII, VIII, XI and XIV evidence that partition. Certain specific properties were then allotted to each of the said four sons of Shavaki Abdul Rajack in the life-time of the father. It does not appear from the evidence

whether these four sons or any of them inherited any other property from their father on his death. It must be assumed for the purpose of this suit that they did not.

Shortly after the partition, the third of these sons, Haji Hassan, established a trading firm on his own account. Later on, but at what exact time it is unnecessary to fix, his younger brother Hammed (the fourth son) worked in the firm established by the elder brother. Hammed brought no capital into the business, which was carried on exclusively with the property inherited or acquired by the elder brother through his own exertions.

Whether there were any clearly understood terms on which Hammed joined his brother's business, does not appear. There is, however, one circumstance to which great weight must be given; the terms in which several years after the two brothers had been working together in the firm the relationship between them is referred to by the elder with the unequivocal concurrence of the younger in Exhibit XVI. This document has been called by the learned District Judge a Will, and though its operation is not expressly made to depend upon the death of the executant, it has some of the features of a Will.

The genuineness of Exhibit XVI was attacked before us mainly on three grounds: (1) that it is not shown to have been produced on any occasion previous to this suit, though there have been disputes amongst the members of the family, notably in connection with the mutation of names on the deaths of Dodda Moidin, Dodda Hassan and Sanna Hassan, when the document may well be expected to have been relied upon had it then existed; (2) that admittedly it was never given effect to; and (3) that by a comparison of signatures on Exhibit XVI with the signatures in Exhibits V, VII, VIII and XII, suspicion is cast on the former. Having given all weight to these objections, I see no reason to doubt that Exhibit XVI is genuine. That was the conclusion at which the learned Judge seems to have arrived. A comparison of the signatures seems to me to strengthen that conclusion.

Exhibit XVI is dated the 3rd September 1845. It purports to be executed by Haji Hassan, when he was about to start on a pilgrimage to Mecca. He refers to the partition of 1818 and states that the property that then came to his share (under Exhibit XIV) had been added to by his own self-exertions. He also mentions some other properties. The properties referred to in it, are altogether valued as equivalent of about Rs. 23,000 He then states: "As my younger brother Hammed Saheb has been with me till now, doing such acts as I directed him to do, and as he should remain when I start for Mecca, he shall get" one-eighth of the property. At the bottom of Exhibit XVI, it is stated that it is written "in the hand of Hammed Saheb with his own consent."

It has been the case of both parties that on its true construction, Exhibit XVI must be taken to have been executed in contemplation of the probability that Haji Hassan would not come back to take charge of the properties or the business and that, in any event, the younger brother would survive the elder. Neither of those expectations was realised. Haji Hassan did come back two or three years after he left, apparently before 1848; the accounts of 1848-49 refer to him. He lived till 1870—for 25 years after Exhibit XVI had been executed. His younger brother, Hammed predeceased him by four years, dying in 1866.

Before dealing with the significance of Exhibit XVI, I shall conclude my reference to the history of the family. After the death of Haji Hassan, the members of both branches lived amicably, just as they would have done if they had been members of a joint and undivided Hindu family. The family group came in time to have three living houses at Souda in South Canara, where the firm was carrying on business; but the home of the family (in the words of the District Judge) remained in Manki in North Canara, from where they originally came. The firm (as I have already stated) was managed (1) by Haji Hassan and Hammed; (2) after the death of Haji Hsssan, the management of the firm seems to have been with Dodda Moidin, the son of Haji Hassan, at least the whole of the properties were transferred to his name; (3) after the death of Dodda Moidin, Abdul Rajack, the eldest son of Hammed and son-in-law of Haji

Hassan, seems to have been in management; (4) thereafter, there appears to have been two managers (i) Dodda Hassan, the eldest paternal grandson of Haji Hassan and (ii) Sanna Hassan, the second son of Hammed and father-in-law of Dodda Hassan.

As to the manner in which the accounts stood: I. They stood solely in the name of Haji Hassan till 1870. II. Between 1871 and 1882, they stood jointly in the names of Dodda Moidin and Abdul Rajack. III. There seems to be no evidence as to the names in which the accounts stood between 1883 and 1897 (the learned Judge's remarks on page 37, lines 13—16, were admitted before us to be erroneous). IV. From 1897 to 1901, they stood in the name of the 9th defendant, Hussain Sahib, eldest male descendant of Haji Hassan, with the names of Muhammad Shiddik and Ali Sahib (who are the sons of Abdul Rajack, but who are also the maternal grandsons of Haji Hassan). V. From 1901, the name of the 11th defendant, a brother of the 9th defendant, is also inserted.

I shall have to refer in detail at a later stage to the evidence showing the feelings between the two branches of the family in 1897, when Dodda Hassan died leaving no sons but only a widow and daughter as his heirs. At present, I need not allude to them, as Mr. K. Srinivasa Aiyangar for the appellants conceded that the members of the younger branch were entitled to some share in the property in question, and because there were admissions to that effect binding upon his clients.

The question remains, in which properties the plaintiffs are entitled to share and to what share they are entitled. In connection with this question, I will refer first to Exhibit XVI which in my opinion is clear evidence that the property mentioned in it belonged at its date to Haji Hassan alone. As it was not given effect to, and as Haji Hassan survived Hammed it might have been argued that it became ineffective and Hammed or his heirs acquired no interest in the said property by reason of Exhibit XVI [Cf. *Oomuttoonnissa Beebee* v. *Areefoonnissa Beebee* (1)]. It was, however, conceded by the contesting defendants that Hammed and his heirs ought to be given one-eighth of the property mentioned in Exhibit XVI.

I have already pointed out that Exhibit XVI refers specifically to identified properties, and that it is not intended to cover future acquisitions.

The property acquired by or on behalf of Haji Hassan between 1845 and 1870—for three years exclusively by the labours of Hammed, from 1848 to 1866 jointly by the two brothers, and for the last four years, exclusively by Haji Hassan —may be governed by one of three sets of considerations:

(1) On the basis, that the said property must belong exclusively to Haji Hassan and his heirs, because Exhibit XVI, however favourably it is construed, cannot be taken to affect future acquisitions: even to the extent to which it goes, it was not given effect to by Haji Hassan, though he survived Hammed; or

(2) On the basis that Hammed must be given one-eighth share in the said property on the analogy of the provisions of Exhibit XVI as *quantum meruit* for his work in the firm; or

(3) On the basis that Hammed must be taken to have acquired a one-eighth share in the property mentioned in Exhibit XVI in 1845, that he ranked as a partner after that date and that as such under S. 253 (2) of the Indian Contract Act, he became entitled to share equally in the profits of the partnership business after 1845.

The following considerations must, it seems to me, be borne in mind in arriving at a conclusion on this point: —

(1) Hammed brought no initial property to the firm which was established by his elder brother, Haji Hassan. It is true that Hammed may have had some property of his own; Exhibit XIV gives particulars of what was given to him in the partition of 1818. But the properties mentioned in Exhibit XVI are, it is clear, exclusively Haji Hassan's. It was clearly for the heirs of Hammed to trace out and show the origin of property which, as it is now suggested, belonged to Hammed and was at some time or other thrown in by him into the assets of Haji Hassan. It seems to me much

(1) (1865) 4 W. R. 66.

more likely that, as is usual amongst Muslim families, Hammed kept his own funds separate. Exhibit XVI certainly does not give countenance to the unusual course having been followed, of the elder brother having taken the comparatively small property of his younger brother into his flourishing firm, without there being any necessity for it. The accounts would have shown if this had been done and mention would in all probability have been made of it in Exhibit XVI.

2. Hammed worked with his brother as a dependent. No mention is made of his having brought any capital to the firm, or of his having been made a partner.

3. In 1845, the entire property was, with Hammed's consent, described as Haji Hassan's and only a one-eighth share therein is allotted to him as a favour by his elder brother.

4. Hammed does not seem to be made a partner of his elder brother by the terms of Exhibit XVI; it is merely provided that he shall get a part of the property in the same way in which the wife would get a similar part.

5. Hammed is spoken of as a dependent and, though it is contemplated that the firm would in future, *i.e.*, after Haji Hassan's death or retirement, belong to the son of Haji Hassan, the nephew of Hammed, yet the uncle is referred to as the manager of his nephew's firm, and not as a partner in that firm. It would rarely happen that a younger brother in a Muslim family should be spoken of as a dependent of his elder brother, though they are both partners. It is much more difficult to think that the uncle should, in similar circumstances, be referred to in this depreciatory manner.

6. The origin of the properties being traced to Haji Hassan, it is for Hammed's heirs to prove the means by which a portion of the property became transferred to themselves. Joint acquisition may no doubt give a title to co ownership on grounds similar to those on which the law as to partnership is based. But the terms of Exhibit XVI do not indicate a joint acquisition in such a sense as to require an equal division of the property acquired. On the other hand, I must concede that there is no indication that the firm as a going concern was considered as any great asset in itself, and this fact might render it easier to bring in the operation of S. 253 (2); for, where the good-will of the firm is deemed to be the main instrument of acquisition, it might be that the proportion in which the assets of the firm are owned, would have to be considered the main factor in determining the proportion in which the properties acquired, were to be shared, rather than the fact of joint exertion; consequently, where a person has a proportionately small share in the assets of such a firm, the good-will of which is the main instrument of acquisition, there is less reason in the absence of clear evidence) to presume that the main instrument of acquisition is owned in unequal proportions.

(7 Exhibit XIV does not refer to an immediate transfer of the one-eighth share of the property to Hammed. It is in the nature of directions that such a transfer should take place. It is sufficiently straining the effect of Exhibit XVI to say that Hammed's heirs are now entitled to get one-eighth of the property because Haji Hassan intended him to get as much; but it cannot, it seems to me, be construed to mean that the one-eighth had become Hammed's from its date. Hammed is mentioned in it as only one of the several persons entitled to share and that which he can claim under it, the widow and the rest can also claim.

(8) Exhibit XVI clearly shows that whatever may have been the terms on which Hammed worked in the firm of his brother, they were not partners; and that in 1845, Haji Hassan, with the consent of Hammed, laid down that the interests of Hammed in the property referred to in Exhibit XVI, should amount to a one-eighth share of that property, neither more nor less. No reference is made in Exhibit XVI to future earnings and acquisitions; and in accordance with its terms, the said share of the properties then in existence, was to form the consideration also for Hammed's continuing to work in the firm after Haji Hassan left for Mecca.

(9) The conduct of the two brothers and of the members of the family seems to me to have been such as would be expected from brothers between whom the business relations

referred to in Exhibit XVI were continued, and the treatment of the younger brother by his elder together, with their conduct towards the other members of the family, do not appear to me to require the inference that the younger brother was given the higher status of partner. My consideration of the question is not unaffected by the fear that to hold otherwise would in one sense penalise cordial and considerate relations between brothers. It would imply that if two brothers trade or otherwise work together, one of whom alone contributes the capital, he may not permit the fact of their being brothers to colour the terms upon which they associate in their work; any treatment different from that which would be expected from strangers, would in that case involve a division of the acquisitions between the two brothers, which but for such treatment would be the property of one alone.

On a consideration of all this, I am clearly of opinion that the two brothers were not partners on equal terms, but that Haji Hassan was the sole owner of the firm and that the proper remuneration to be paid to Hammed for his work was in 1845 fixed upon between them at one-eighth of the assets then existing; but that he was not entitled to rank as a partner from 1845 nor on that basis to claim half of the future acquisitions.

I feel, however, much greater difficulty in deciding whether he ought not to continue receiving one-eighth of the acquisitions between 1845 and 1870. I have arrived at the conclusion that he ought not, for reasons which I have already indicated, to which I may add that (1) however proper it might now appear that Haji Hassan should have provided for a division of the future acquisitions, as a matter of fact he did not so provide, and (2) that Hammed and his family were, it would appear, living with Haji Hassan, who was bearing their expenses.

Hence after very careful consideration, it seems to me that the most proper view of the matter would be to hold that Exhibit XVI should be given effect to, but as on the death of Haji Hassan, so that (1) as conceded by the defendants, Hammed should have one-eighth of the properties mentioned in Exhibit XVI and (2) the properties acquired between 1845 and 1870 should be exclusively Haji Hassan's and his heirs.

In this connection, our attention has been drawn to the fact that three of the properties are shown to have been purchased in the name of Hammed. Exhibits XVIII, XIX and XX refer to them. They are dated 1844, 1849 and 1848, respectively. The considerations for them were Rs. 280, Rs. 800 and Rs. 196. These properties were transferred to "Hammed Sahib, younger brother of Hassan Saib, of Souda" and to "Savada Hassan Sahib's brother, Hammed Sahib," and they were in 1866 (on the death of Hammed) transferred to the name of Dodda Moidin, the son of Haji Hassan. It seems to me that these facts indicate that the properties must be taken to have been acquired on behalf of Haji Hassan. They are not to be considered Hammed's separate property.

The next question, therefore, is as regards the ownership of the property acquired after 1870.

As I have already said, Hammed Sahib's heirs became entitled on the death of Haji Hassan to one-eighth of the property mentioned in Exhibit XVI. The heirs of Haji Hassan and Hammed, therefore, became co-owners of the property in the proportion of seven-eighths to one-eighth. It seems to me that the evidence discussed by the learned District Judge in detail, on the basis of which he has arrived at the finding that the family consisting of the plaintiff and defendants is joint and undivided, is sufficient to show that the two groups of heirs, namely, those of Haji Hassan and Hammed were jointly entitled to the property on their death.

I have mentioned in an earlier part of the judgment the disputes between the elder and younger branches of the family. The documents bearing on this point, may all be grouped together as arising from the proceedings relating to the mutation of names on the deaths of Dodda Moidin, Dodda Hassan (son and grandson of Haji Hassan) and of Sanna Hassan (son of Hammed). They establish in the first place, what is no doubt contested in some of the written statements but what, as I have already said, was not denied before us, that the plaintiff is entitled as of right to some share in the property which is the subject-matter of the suit and that the allowances paid for

maintenance and otherwise were not merely in the nature of charitable allowances. I shall consider them now in some detail.

(1) The genealogy, Exhibit D, was accepted by the members of both branches, who agree in representing themselves as belonging "to an undivided family (*aribaktha kutumba*," This description would, if it is interpreted in its strict sense, exclude the females mentioned in the genealogy from any share in the family property. It is clear that their inclusion, in a family governed by the Hindu co-parcenery law, is meaningless, and in any case, such inexactness in referring to the status of the family and of the rights of the members constituting it, cannot prevail against the clear statement of all parties that the law of succession governing them is Muhammadan Law, according to which the females must be given their rights of inheritance. At the same time, these expressions do amount to an admission that all the males mentioned in the genealogy have an interest in the immoveable property ; that such property was held in common ; and that the fact that the *pattah* relating to it stood in the name of Haji Hassan who belonged to the elder branch of the family, was not considered by the members of that branch itself as assertive or indicative of the sole right of that branch in the properties concerned.

(2) In Exhibit E1 (September 1897), the 9th defendant, a member of the elder branch, says :—

"As shown in the annexed genealogical tree, we are all heirs, and there are heirs of the second branch, and being members of an undivided family not only the management of the lands but all the remaining managements are conducted jointly as a whole as family concern.—— The *kathi* standing in the name of my father (Dodda Moidin) had been, after his death, transferred to the name of the eldest son of the deceased. As I alone am, after him, the senior member and as there remains property belonging to an undivided family, I alone am the *hukdar* and *kathi*.....Therefore as had been done from the time of our ancestors out of respectability, *kathi* should be entered in my name so as to be convenient to conduct all our proceedings." .....

(3) In Exhibit E2, dated 4th October 1897, Souda Hussain, the 9th defendant says :—

'as given in the genealogy herewith attached, the deceased has got near heirs. And there are heirs of branch two. The heirs of both the said branches are undivided.....Alli Sahib *vallad* [*i. e.*, the son (of Abdul Rajack) the 15th defendant], being in Souda, manages the shop.....In the undivided family of the two branches and in our household, my father looked after the management till his death and all the members of the family (*i. e.*, both branches) are supplied with necessaries from our household."

(4) Again when the *patta* for the five properties in Kundapur *taluk*, was transferred to the name of the 8th defendant who was the paternal grand-daughter of Hammed Sahib, but married to Dodda Moidin, the paternal granson of Haji Hassan and the elder brother of the 9th defendant, the 9th defendant put in an appeal petition, Exhibit F, in December 1897 in which he said :—

"That in consideration of personal status and property qualification, appellant has been appointed a member of Taluk Board and in deference to personal status of appellant even the elderly members, sons of Abdul Rajack, have given their consent to the *kudthala* being changed in the name of the appellant for the reason that the said properties both in Honnavar and Cundapoor *Taluks*, were acquired by appellant's grandfather, Haji Hassan Saiba, and appellant's father, Moidin Saiba." "That the said Sanna Moidin Saiba, though the eldest male member in the family, has been abandoned by other members of the family in his endeavours to secure the *kudthala* in his own name, because, he is not a well wisher of the family and much less qualified to be *kudthaladar* and his consent to have the *kudthala* in the name of respondent is purely an act of vengeance and resentment, tending to the destruction of family properties."

Then followed a mediation. In the result out of five properties paying a total assessment of Rs. 451-8-10, properties bearing an assessment of Rs. 173-2-0 were agreed to be transferred to the 9th defendant's name and the remaining

properties, bearing an assessment of Rs. 278-6-10, were agreed to be transferred to the 15th defendant's brother's name. The order Exhibit F2 was passed accordingly in October 1898.

(5) The 8th defendant herself in Exhibits E5 and E9 seems to admit that the 9th defendant has a "right to manage" even in the very application by which she desires that the *patta* should be transferred to her name. But as the parties are governed by Muhammadan Law, the 8th defendant could not be under the necessity of having the properties to which she was entitled by inheritance managed by the 9th defendant. The reference to management by the 8th defendant and the terms in which the reference is made, throw light on the mode of life adopted by the parties.

(6) Finally, the abstinence on the part of the 9th defendant to assert any superior title in the ownership of the properties as against the members of the junior branch is specially noteworthy.

On a consideration of all the circumstances, my conclusion with reference to the properties acquired by the firm after 1870 is that they must be taken to have been acquired by the joint labours of the heirs of both the brothers. It seems to me, therefore, that S. 253, clause (2), of the Indian Contract Act is applicable, and that the said acquisitions must be divided equally between the elder and the younger branches.

I must state here that it is conceded that at least one-eighth should be given to the heirs of Hammed Sahib. Moreover, the learned Pleaders for all the parties before us stated on behalf of their clients that none of them desired to claim anything either on their own behalf or on behalf of their ancestors by way of remuneration for conducting the affairs of the partnership firm originally established by Haji Hassan, and that all were agreed that they would claim only on the basis of inheritance from their ancestors and on the basis that in all other respects, the rights of all the parties concerned, stood on the same footing. If my view of the case is correct, this concession was very properly and wisely made. Otherwise it might have become necessary to determine :—

Who were entitled to share the acquisitions of property of the firm from time to time, after the death of Haji Hassan until the date of the suit.

(*a*) as partners under S. 253 (2) of the Indian Contract Act,

(*b*) as having been admitted partners under S. 247,

(*c*) as representatives of a deceased partner under S. 241,

(*d*) as lenders under S. 240, and

(*e*) as annuitants or receivers of portions of the profits under S. 243.

The determination of these questions would have required a detailed examination of complicated accounts, and would probably have resulted in greater delay and expense than gain to any of the parties.

On the conclusions of fact at which I have arrived, and on the waiver by the parties of any claims they might have had on basis other than that of inheritance, it seems to me that the shares of the various members of the family will have to be determined in accordance with the Muhammadan Law of inheritance, in a mode similar to that adopted by the learned District Judge in paragraph 24 of his judgment. Owing to the admissions to which I have referred, the parties will be entitled to a proportionate share of all the properties acquired on behalf of the family group up to the time of the suit, as the share of Hammed in the properties by the aid of which acquisition after 1870 has been made has continued to remain in the firm.

I might have concluded my judgment here; but owing to the fact that my learned brother and I take different views, I must consider in the first instance the method of decision adopted by the learned District Judge and state in some detail my reasons for differing from him and my learned brother.

The learned District Judge has considered on the evidence whether the family of which the plaintiff and defendants formed members was a "joint family," and after a very careful examination of the evidence, he has answered that question in the affirmative. With great respect, however, it seems to me that this is an erroneous basis. In speaking of parties governed by the Muham-

madan Law of succession, the expression "joint family" presumably refers to a group of persons belonging originally to one family, and living together without having partitioned such property as they have inherited from some common ancestor. Their continuing so to live does not make their status different from what it would have been, had they not done so. Nor does the fact that they have not partitioned the property in any way, affect their rights therein, or the legal incidents applicable to the property.

No person can, by birth, derive an interest in the property belonging to his father during the latter's life-time. The members of the group of persons so living together (whether or not they are collectively styled a joint family) do not form any legal unit: they are not necessarily heirs of one another; property acquired by one of them does not necessarily form the property of the whole group. The group as constituted at any particular moment, is not the legal representative, or the continuous successor in law, of the persons who constituted the group in a previous generation. The result of this is, that it cannot be said that all the property which at any time in the past belonged to the group as a whole, continues to belong to the persons now included, whether arbitrarily or according to agnatic descent, in the group. The property may have devolved upon some members of the group to the exclusion of others, and may have partly devolved on strangers to the group. Strangers not forming members of the group, may be interested as heirs (even by marriage) of those who form the group, or be entitled to demand their share in the property possessed by the group. Hence, to hold that a person forms a member of such a group, does not necessarily imply that he has any share in all the property possessed by each of the other members, or kept in the possession of some person as the manager on behalf of all the group, whether such possession is held at their request, or with their consent, or merely with their acquiescence.

The question elaborately discussed by the learned Judge, whether or not the various members of the family *considered* themselves joint, and whether the plaintiff has been treated as a member of a joint family, may, no doubt, be important for the purpose of deciding whether the defendants have any property in their possession in which the plaintiff is entitled to share by inheritance or otherwise, and whether the plaintiff's rights are prevented from being barred by limitation. For, the fact that the plaintiff has been receiving maintenance, and other allowances from the defendants till within a recent date of the suit, is evidence of the fact that the defendants have been admitting the existence, in their hands, of the property in which the plaintiff is interested. Before us, however, the plaintiff's right to some share in the property held by the contesting defendants, has not been questioned, and it has been conceded that his right is not barred except with reference to some particular classes of contentions to which I need not now allude, though both these questions were raised in the lower Court.

The view taken by the learned District Judge and accepted by my learned brother is that because there is a good deal of evidence pointing to the conclusion that the parties have considered themselves to be, and acted as though they were, members of an undivided Hindu family, therefore their rights must be similar to those of the members of a joint undivided Hindu family I regret that I am unable to accept this conclusion. It is the case of neither party that the Hindu Law governs their property. It is expressly stated in the plaint as well as in the written statements of most of the defendants that Muhammadan Law governs them. In these circumstances, it seems to me difficult to see how the Hindu Law can be applicable. The Hindu Law of joint family property is also difficult to be applied on general grounds for two reasons :—

In a Mussalman family, daughters, wives and mothers become entitled to shares in the properties and not merely to maintenance. When a childless widow becomes entitled to a share in the property, her estate would entirely go out of the ownership of the family group, and after her death, her heirs would be her parents, or her sisters and brothers, or even remoter relations.

Apart from this difficulty, however, and even if we had only Hammed and Haji Hassan to consider, I am unable to under-

stand, when once it is conclusively shown that certain properties belonged to only one of them, how it is possible for the other to acquire a share of it unless it is by means of transfer (with or without consideration) or devolution as heir. Hammed was not the heir of Haji Hassan and, therefore the only way in which he could become entitled to a share in the property of his brother, would be by transfer in his life-time or bequest. There never has been any suggestion that Haji Hassan made a gift of half his property to Hammed.

My remarks do not refer of course to the question whether a property jointly acquired by the exertions of two persons, should not from the very start belong to them both jointly. I am not dealing with property so acquired, but with property such as is referred to in Exhibit XVI, which is shown to have been at the start the property of Haji Hassan alone.

I do not understand how in Muhammadan Law the mere fact that one person allows another to live with him and treats him as though he were co-owner with himself of property which is shown initially to belong to him alone, can make the other a co-owner. Such circumstances may raise a presumption of co-ownership when the origin and ownership of the property is not traced and when it is not known whether one is the owner or the other. But how can these circumstances avail to transfer the ownership, or to convert sole into joint ownership?

The presumption arising in Hindu Law from such facts as I have alluded to, is based, it seems to me, on incidents of the law which cannot be imported into Muhammadan Law. If two Hindu brothers after partition again live together, and throw their property together, the property may no doubt acquire new incidents in Hindu Law. From the fact of joint living, it may be inferred that the brothers had re-united and intended to hold property with rights of survivorship, etc. But how can a similar conclusion be drawn with reference to Mussalmans? Even if they were to throw together their property, each would, in the eye of the law, be entitled to his one half. If they have children, one cannot be the heir of the others; and the incident of survivorship cannot be introduced in the ownership of the property.

Hence it seems to me to be difficult to conceive by what process Hammed or his heirs can have acquired half a share in the property which is shown to have been Haji Hassan's sole property, as distinguished from property which was acquired by the joint exertions of Haji Hassan and Hammed or their heirs with the aid of joint property.

It seems to me with great respect that on the principles suggested by my learned brother, though it is admitted that Muhammadan Law governs the parties, in the same breath with which that admission is made the Hindu Law is in fact applied; and the reason that is alleged is that Haji Hassan and Hammed lived like members of a Hindu joint family. But in the *first* place, the mode of living cannot affect the law to which they are subject, and *secondly* the mode of life does not seem to me to be peculiarly Hindu, as I do not see how it differs from the mode in which Muslim brothers would live together, except that their heirs died without partitioning their estates. Such a state of circumstances is contemplated in the *Fatawa Alamgiri, Cf.* Baillie's Digest, Book XI, Chapter XI. Nor am I able to appreciate how there can be any estoppel. If I am right in taking Exhibit XVI as evidence that the property mentioned in it was Haji Hassan's Hammed certainly knew that fact. Can Hammed then turn round and say to his brother, "True, this property was yours and I knew as well as you or any one else that I had no right over it, but you have been such a kind brother to me and been treating me as though I were co-owner of the property with you. Now, therefore, you are estopped from denying that I am entitled to half of the property." If this is the law, hospitality and kindness are virtues reserved to those who are willing to give away a moiety of their property to every guest whom they ask to make himself at home in their houses. As we are dealing with Muhammadan Law, it would not be merely brothers who would be able to claim this advantageous result from hospitality. It would be open to every stranger.

I now come to deal with the question how, when the parties are governed by Muhammadan Law and have been

living together without partitioning their property, the interest of each member must in my opinion be determined. In doing so, it seems to me that the following considerations have to be borne in mind: (1) Whether the plaintiff is entitled to any of the properties which are the subject of the suit by (*a*) inheritance, or (*b*) by acquisition, because the properties in the hands, of the defendants were acquired by the exertions either of the plaintiff alone or of the plaintiff and the defendants; (2) whether the rights arising under these two heads, have to be diminished to the extent of any advances or payments that have to be debited to him. For, in Muhammadan Law co-owners of property, notwithstanding that they live together, would be expected to pay for their own maintenance, and other expense out of their own shares in the property held in co-ownership. This effect can, of course, be nagatived by agreement and the existence of such an agreement may be presumed from the conduct of the parties and their mode of life in any particular case. It is conceded before us that in the present case such an agreement may be presumed.

Before I deal with joint acquisitions, I must distinguish acquisitions made exclusively by the exertions of any individual member which would ordinarily be his own property. The fact that the property in the hands of a person belonging to the group is obtained by inheritance and would under the Mitakshara Law be styled ancestral property, does not by itself fix with any special character fresh property acquired with the assistance of such "ancestral" property. Such fresh acquisitions do not of necessity belong to the group described as the joint family. If they belong to the group it is only by reason of some such causes as I am going to mention. It is on this ground, that it seems to me that the property acquired prior to 1870, must be considered to be Haji Hassan's, with merely a claim on the part of Hammed or his heirs to be given some remuneration for having assisted in the acquisitions, a claim, which owing to the existence of Exhibit XVI and the concession of the defendants, is taken by me as amounting to one-eighth of the properties mentioned in Exhibit XVI. The question to which I have just alluded, may also arise in connection with properties claimed to have been acquired separately by the 11th and 22nd defendants amongst others.

Distinct from such separate acquisitions, are acquisitions made by the members of the family working together (*e. g.*, by carrying on a joint trade) with property of which they are co-owners: such co-ownership may arise from the property having been inherited from a common ancestor, or from the fact that the parties are the legal representatives of those who were in the past partners in a firm. Acquisitions by co-owners, made with the assistance of property held in co-ownership, it seems hardly necessary to say, themselves become property held in co-ownership. It may also be that contribution to the funds necessary for making the acquisition possible was on the implied condition that the persons so contributing were to share in the fruits, even though they may not have actively or otherwise assisted in making the acquisitions. Such a contract may be implied from the conduct of the parties and their mode of life may supply evidence of such conduct. For, though no person can claim to be entitled as of right to carry on a business carried on by his father in partnership with other persons (in the same way as in a joint family or ancestral firm amongst Hindus governed by the Mitakshara Law), yet where a number of persons are living together united by ties of kinship and where the persons so living together, depend for their livelihood upon the profits of the business carried on by them or some of them, the relationship of partners can hardly be prevented from arising. Owing to the statements made to us by the learned Pleaders in Court, I have assumed that the parties in the present case admitted the existence of such implied contracts.

Mr. K. Srinivasa Aiyangar for the appellants strongly urged that no question of partnership can arise in the present case, the pleadings being on the footing of co-ownership and not of partnership. But the origin of partnership has itself been explained in Roman Law to be the "Consortium" of co-heirs. The exposition of this class of partnership in Roman Law is so suggestive that it may be here referred to with advantage. Thus I find that Professor Roby, in his

Treatise on Private Roman Law, Volume II, pages 127, 128, after defining "a partnership" as "a contract whereby two or more persons agree to work together for common profit, or to acquire and hold property in common, sharing the gains and the losses," continues: they "may combine only for one particular piece of business, or to carry on a continuous trade or enterprise, or they may even agree to put all they have, into a common stock and share each other's fortunes of whatever kind." He adds in a foot-note :—

"It is probable that this thoroughgoing partnership sprang from the position of brothers and sisters living together as joint heirs to their father. *Consortes* appears to have this special application. Gellius (i. 9 speaking of the Pythagoreans says, *quod quisque familiæ, pecuniæ, habebat, in medium debat, et coibatur zocietas inseparabilis, tamquam illud fuit anticum consortium, quod jure atque verbo Romano appellabatur 'Eroto non Cito' (erctum non-cito)*"

"Where there was no summons to divide the inheritance." Then Professor Roby's text continues :—

"In the absence of any wider intentions clearly shown, the partnership will be taken to relate only to business matters and to the gain and loss thence arising, in which case inheritances, legacies, gifts will be outside the contract."

This illustrates, *first*, that where a group of persons belonging to a family governed by Muhammadan Law, work together for the purpose of earning their livelihood and acquiring properties, the transition leading up to the formation of such a thoroughgoing partnership is extremely easy, and *secondly*, it indicates limitations on the scope of the partnership and points out a means for limiting the assets and liabilities of the firm, even in regard to the rights of members directly participating in the labours of carrying on the firm, or holding possession of its assets or profits or adding to its liabilities.

Here again, there is a certain analogy with the law governing a Hindu family firm, but it seems to me that the analogy is not complete. It is true that Hindu family firms are the partnerships which in India have the closest resemblance to such "thoroughgoing partnerships" amongst Mussalmans as we have to deal with in the present case. Their analogy is alluring, because the Hindu Law furnishes a simple method of determining the rights of the parties: under it the whole group continues to be a single legal entity making it unnecessary to trace out the legal results on the decease of each ancestor of the claimant. For reasons, however, which I shall state, it seems to me that this easy process is not available unless the parties are willing (as they are in the present case) to have each one of themselves treated as though he or she were a partner with the right to share in the profits of the firm (or future acquisitions) in the proportion of his or her interest in the assets of the firm, irrespective of Ss. 240, 241, 243, 247 and 253 (2) of the Indian Contract Act.

The learned District Judge has referred to *Khatija* v. *Ismail* (2) in the beginning of his judgment in the following terms :—

"The parties are *Navayats* the customs of which race are recorded in *Khatija* v. *Ismail* (2). Ordinarily *Navayats* follow the joint family system of the Hindus but conform to the Muhammadan Law in succession. The evidence in this case shows that these parties do the same and there is absolutely nothing to prove otherwise. I, therefore, find that they follow this custom."

The result of the decision in *Khatija* v. *Ismail* (2) seems to me to be stated too broadly in this passage. All that is there laid down is that amongst the *Navayats* "though the devolution and distribution of the property were regulated by the rules of Muhammadan Law, the Hindu system of managing joint family property by a male co-parcener was in vogue."

It need hardly be pointed out that the fact that a particular custom is relied upon and held by the Court to have been proved in one case, does not empower the Court to take judicial notice of it in another case; judicial notice may be taken only of a custom that has been repeatedly proved. In this case, no special custom was pleaded; nor is any general custom referred to in *Khatija* v. *Ismail* (2). But the word 'custom' frequently invites a confusion of ideas. In its legal sense, custom must of neces-

(2) (1889) 12 Mad. 380.

sity connote only such rules of conduct as affect rights and liabilities. Evidence of the peculiar ways of living adopted by any class of persons may have to be adduced for an elucidation of the facts existing in any particular case. But this does not make those ways of living or observances customary rules of law. There may, however, be sufficient evidence in the present case for holding that the particular family concerned, has adopted a way of living which is similar to that adopted by members of a joint Hindu family. But what is far more important is that the parties are agreed that their rights are to be governed by Muhammadan Law and that they have not adopted the Hindu Law of succession.

Is there any reason why the assets of the firm originally established by Haji Hassan and carried on by the ancestors of the plaintiff and the defendants, in which members of these branches have acted as partners or managers, should be governed by the law applicable to a Hindu joint family or ancestral firm governed by the Mitakshara Law? In order that this question may be answered, I must refer to rules governing such Hindu firms which may be relevant to the questions involved in the present litigation, and consider the reasons why such firms are governed by what in effect must be considered to be special rules of law.

The leading case relating to a Hindu joint family firm, seems to be *Ramlal Thakursidas* v. *Lakhmichand Muniram* (3). It does not seem to have been expressly noticed in the decisions following that case that it was decided in 1861, long prior to the passing of the Indian Contract Act. The learned Judges who decided the case say:

"Being a matter of contract between Hindus, the laws and usages of Hindus must govern the decision."

The principles laid down in the leading case seem, however, to have been given effect to in later decisions in the same way as if they were unaffected by that Act. Be this as it may, it seems to me that if the provisions of the Indian Contract Act were applied to the case of a joint family firm governed by the Hindu Law, the same result may be arrived at, at least in the great majority of the cases, as that to which the decisions lead us. The most important decisions seem to me to be reconcilable with the view that the Indian Contract Act applies to a Hindu family firm, but that the incidents of the Act are affected by the peculiar doctrines of the joint Hindu family, which doctrines are incorporated in the law of Hindu ancestral firms, just in the same way as the provisions contained in the articles of partnership relating to any particular firm may be incorporated. The Indian Contract Act in this view governs Hindu family firms as much as any other firm; but the incidents of a Hindu joint family firm are different from those of a firm not subject to the Hindu joint family law, just as, under the Act, a firm having one set of articles of partnership, will have different incidents from a firm having another set of articles. Thus, for instance, S. 241 of the Act lays down that "a contract to the contrary" may prevent a particular result following. That same result is prevented from following in the case of a Hindu joint family firm by the fact that by the operation of the Hindu Law, the sons of a father become partners with him in his life-time by birth, and may continue to be partners after his death. If, on his death, they continue to carry on the business, the same results follow as though they had agreed to continue the firm as such partners. See *Samalbhai Nathubhai* v. *Someshwar* (4). Similarly, the contract referred to in S. 245, must have reference to the law governing the parties; and under S. 247, a minor may be admitted by operation of the law to the benefits of the partnership, and may have his share in the property of the firm, but be free from personal liability for any obligations of the firm. See *Ragthunahji Tarachand* v. *Bank of Bombay* (5).

Thus I take the decisions relating to Hindu joint family firms to show that the Indian Contract Act lays down that the relations between the members of the firm must be presumed to be to a certain effect, in the absence of a contract to the contrary; that the contract to the contrary may be an implied contract; that such an implied contract may be presumed from the mode of life resulting from the general personal law of the parties, especially when not presuming such an implied contract, would bring about inconsistencies, and results unexpected by the parties themselves.

(3) (1862-65) 1. B. H. C. R. App. 51.

(4) (1880-81) 5 Bom. 38.
(5) (1910) 34 Bom. 72=2 I. C. 173.

If this is so, then in any event, the Indian Contract Act must be looked to primarily for determining the incidents of the firm established by Haji Hassan, even though the mode of life adopted by the members of the family was that prevalent amongst members of a joint Hindu family. That fact, however, must be brought to bear upon the rules contained in the Indian Contract Act, and must not be made a medium for conducting all the incidents of a Hindu family firm into the present case. Thus the law of survivorship among co-parceners by which sons acquire an interest in the ancestral property of their father during the life-time of the father, does not find a place in Muhammadan Law ; and widows and daughters take definite fractions in the estates of the deceased, and the property represented by those fractions, is not liable to be diminished by any subsequent conduct of the partners of the firm. The right of such ladies may under certain circumstances differ from the rights of those male members who assist in the business, and in the acquisition of property, because the latter would under the Indian Contract Act be entitled to be considered partners in regard to the acquisitions made by efforts in which they have joined, whereas females and such males as have not contributed their efforts in acquiring new properties, would not be partners.

Again, in the case of an ancestral firm whose members are governed by Muhammadan Law, one of the members may die leaving no heirs within the group of persons living together and working in the ancestral firm. His heirs, in the absence of descendants, may be collaterals who have had no dealings with the firm, or with the family group in which the deceased was included. In such a case the share of the deceased partner would nonetheless devolve upon the strangers, and would be subject to the provisions of S. 241 of the Indian Contract Act, whereas in the case of a Hindu joint co-parcenary property (whether or not consisting of a family firm), on the death of any of the members, his estate must necessarily devolve upon persons within the co-parcenary itself. Where one of the partners dies, the firm would ordinarily be considered to be dissolved. [Indian Contract Act, S. 253 (10)]. But since the firm has been continuously carried on, there must, in the eye of the law, be considered to have been, on the death of each partner, a fresh contract, express or implied, to continue the firm. On the other hand it does not follow that the heirs of the deceased partner should become partners in the firm by the very fact of such continuance of the firm, or by the fact that the assets of the firm include the share therein of the deceased partner which by his death has devolved on such heirs. The reason why the sons of a partner in a Hindu ancestral firm are on the death of their father taken to be partners in the firm, is that the sons are co-sharers and partners with their father in his life-time, that in fact, though as between the father and the other members of the firm, the father was one unit, that unit consists of himself and his sons who are co-par ceners with him in the family property. *Samalbhai Nathubhai* v. *Someshwar* (4). Even in regard to a firm governed by the Hindu joint family law, the limitations as to the liability incurred by a partner are indicated in *Bishambhar Nath* v. *Fateh Lal* (6). and *Chalamayya* v. *Varadayya* (7). The result of these two decisions seems to be the same as would have been arrived at by applying S. 241 of the Indian Contract Act, though the section does not seem to have been expressly referred to and the circuitous method is followed of considering, in the first instance, persons to be partners, though they have not taken any active part in, nor had any concern with, the management of the firm directly or indirectly. [See *Bishambhar Nath* v. *Fateh Lal* (6)] and then limiting the liabilities of such persons in a manner which could not be available to partners, but which would result from the application of S. 241. If the liabilities of a partner are not incurred, then it would follow that the rights under S. 253 (2) cannot be claimed.

In the case of Mussalmans, S. 241 of the Indian Contract Act has, it seems to me, a direct operation : in their case there is "no contract to the contrary," nor does their personal law operate so as to make them partners to any extent, or otherwise to minimise the effect of S. 241 on their rights.

After it is determined, who from time to time are partners in such a firm, it is possible to say how the acquisitions and additions from time to time to the property of the firm are to be divided. As I have already said, all the heirs of Haji Hassan

(6) (1907) 29 All. 176.
(7) (1899) 22 Mad 166.

and Hammed were interested in the assets of the partnership, but they were not necessarily partners. The rights of the two different classes of persons would have had to be determined on different bases, but for the concessions to which I have referred. The rights of those who are held to be partners, would have been subject to the rule contained in S. 253 (2) of the Indian Contract Act; and those of the heirs of Haji Hassan and Hammed who would have been held to be partners in the firm would have been considered under S. 241 of the Indian Contract Act to have given a loan of their portion of the property to the partnership. But these details are not necessary in the present case. I have only stated these for making my view of the case clear, and for showing that there are no inherent insurmountable difficulties in the way of applying Muhammadan Law to the assets of the firm as well as adopting the Muhammadan Law of succession.

The result seems to be, therefore, that such cases must be considered, as indeed they are, a series of suits for administration, partition, and dissolution of partnerships. The rights of the parties must be determined with reference to the Muhammadan Law of inheritance and succession, and to the law contained in the Indian Contract Act relating to acquisitions made with joint labour, or by means of property in which more persons than one are interested or with property originally jointly acquired and held in co-ownership and subsequently continued to be held and utilised for further acquisitions by the survivors of the original co-owners on an implied agreement with the heirs of the deceased co-owners.

It will be convenient to record the findings that should in my opinion be given on the issues :—

On issue (1), my answer would be, the parties are the heirs of two brothers who held certain properties in co-ownership ; as such heirs, the parties are themselves co-owners of the properties originally owned by their ancestors, and properties acquired with the aid of those properties.

(2) The parties as such heirs, are entitled to share in the properties mentioned in the schedules to the plaint except in the shop of the 12th defendant.

(3) In the affirmative

(4) In the affirmative.

(5) In the affirmative in the terms stated in my judgment.

(6) } These issues are argumentative,
(7) } and I think my judgment gives a sufficient answer. In my opinion, amongst parties governed by Muhammadan Law, there cannot be such undivided members of a joint family as to prevent their holding private property.

(8) In the affirmative.

(9) In the affirmative

(10) Not barred.

(13) In the affirmative.

(12) } I agree with my learned brother's
(14) } remarks on the District Judge's view with reference to these two issues (see page 23 of the District Judge's judgment) and answer these two issues in the negative.

In my opinion, for the reasons which I regret I have not been able to state at less length, the case ought to be referred back to the District Judge for accounts being taken on the following basis :

(1) That Hammed Sahib was entitled to one-eighth of the properties referred to in Exhibit XVI ;

(2) that seven-eighths of the said property and all other properties acquired prior to 1870, belong exclusively to Haji Hassan and his heirs ;

(3) that the property acquired by the firm established by Haji Hassan after 1870 must be equally divided amongst the heirs of Haji Hassan and Hammed Sahib in accordance with Muhammadan Law.

I would make the costs of the parties come out of the estate, but with liberty to the learned District Judge to declare that any particular sets of costs were unnecessarily incurred and should be borne by the parties themselves.

On this basis, a preliminary decree for partition should, in my opinion, be made, which would be followed in due course by a final decree.

Sadasiva Ayyar, J.—As my learned brother's judgment deals with the preliminary facts and the relationship of the parties at length, I shall not repeat them. Whatever may have been the nature of the understanding between Hammed and Haji Hassan at the time when they commenced to work together, they agreed

in 1845 that the interest of Hammed *in the property referred to in Exhibit* XVI, should amount to one-eighth share of that property. Exhibit XVI further shows that it was only if Haji Hassan failed to return from his pilgrimage that Exhibit XVI was intended to have effect.

Was the interest of Hammed in the assets of the firm that of a partner after Haji Hassan returned, that is, between 1848 and 1866, so that S. 253 (2) of the Contract Act is brought into operation?

The conduct of the two brothers and of the members of the family after Haji Hassan's return in about 1848, seems to me to have been such as would be expected from brothers who consider themselves as equal partners of the business and equal co-owners of all their properties. If Haji Hassan and Hammed Saheb had been Hindu brothers, I think their conduct and the conduct of their descendants and heirs could lead to only one conclusion, namely, that they were equal partners and co-owners. In *Sudarsanam Maistri* v. *Narasimhulu Maistri* (8), Sir V. Bashyam Aiyangar, J., uses the following expressions (in that case two out of five Hindu brothers carried on a business jointly) :—

"It is not alleged that there was any express agreement of partnership, but that as the plaintiff regularly combined his labour with that of the 1st defendant in carrying on the contract business, an agreement of partnership should be implied between them, especially as they were related as brothers." "There being no express agreement between the brothers in regard to the contract business, the question that presents itself for consideration is whether, under the above circumstances, a contract of partnership should be implied or whether the proper inference to be drawn is that there was no legal relation between the brothers in respect of the business, but that the plaintiff regularly and systematically assisted his elder brother in carrying on the work in...expectation that his elder brother would deal with him generously if profits were realised from the business."

"In deciding this question one should of course have special regard to the social customs of the Hindus and to the fact that the plaintiff and the first defendant were brothers...that the nature of the business was such that combination of labour was more important for success than contribution of capital and that the plaintiff's association with his brother in the business for a period of *nearly six years was not casual but regular and continuous.*"

The learned Judge refers to several other circumstances, and then says: "Under these circumstances an agreement of partnership would be implied by law," and adverting to the principles of the law of estoppel embodied in S. 115 of the Indian Evidence Act which is the same as the English Law, the learned Judge held that the first defendant in that case was estopped from denying that the plaintiff was an equal co-owner or partner. In the present case, there is no doubt one circumstance against Hammed Sahib, namely, that he agreed in 1845 to take one-eighth share of those properties belonging to his brother which were in existence in 1845 when his brother started on holy pilgrimage. It does not, however, appear that Hammed had not then other properties of his own. It is further clear that Exhibit XVI which seems to have been unearthed from old forgotten records, was never acted upon, evidently because the elder brother returned in 1848 and the relations between the two brothers became still more cordial than it was before in 1845, the son of the younger brother marrying the daughter of the elder. All that appears afterwards is that the two brothers lived together as if they were members of a Hindu joint undivided family and that both equally managed the affairs of the business and conducted the transactions connected with the immoveable properties which were acquired mostly in the elder brother's name, though some properties of substantial value were also purchased in the younger brother's name. I do not forget that they were Mussalmans and not Hindus, but they were Mussalmans who belonged to a small sect called *Navayats*. Their customs are thus recorded in *Khatija* v. *Ismail* (2), by the late Mr. C. Gopalan Nayar, who was in his days one of the ablest members of the Subordinate Judicial Service:

"It has to be remembered that, though these people are Muhammadans by religion, they conform to Hindu customs and manners to a very great extent. They belong to a class called '*Navayats*' or new comers, being the descendants of a party of Arab

(8) (1902) 25 Mad. 149.

merchants who migrated to Bhatkal near Goa some 770 years ago and took for their wives converts from the Hindu Konkanis of the place. Konkani is still the home language of these people, and it is clear from the evidence of several witnesses that, like their Konkani neighbours, they are not over-fond of division. Though...the common ancestor died in 1856, *his estate was never divided among his heirs, but managed quite in the Hindu fashion by his eldest son...till his death in 1866 and since by the 1st defendant.* That such management was for the benefit of all the heirs of Sayyad Mahomed Sahib (the common ancestor) is indeed clear from the admission of the parties."

The learned Judges of this Court on appeal adopted the same view, namely, that many of the incidents of the joint family system obtained by custom among the *Navayats*. The evidence in the present case also clearly points to the same conclusion.

My learned brother Mr. Justice Spencer had in 1913, as District Judge of Tanjore, to consider a case between the members of a *Rowther* family in Negapatam, the *Rowther* community, while following the Muhammadan Law of inheritance, having also adopted many of the customs of the Hindus. (See pages 96 to 100 of the printed papers in Second Appeal No. 983 of 1913). In *Vellai Mira Ravuttan* v. *Mira Moidin Ravuttan* (9), the High Court observed :

"Although the technical rules of Hindu Law are not applicable to families of this tribe, *the same presumption must arise from facts of a similar kind* and the same principle must be equally held to govern cases of family partnership among Hindus and Muhammadans. The first defendant, having been managing member of the joint estate for a long series of years, must be presumed to have made these additions to the property from the joint estate, unless the contrary were shown."

In *Suddurtonnessa* v. *Majada Khatoon* (10), Markby, J., observed :—

"When a Muhammadan family adopts the customs of Hindus, it may do so subject to any modification of those customs which the members may consider desirable ; and it must rest with the Judge who is to decide each particular case how far he should apply the rules of a Hindu joint family to the case of any Muhammadan joint family that comes before him."

Mr. Justice Spencer approved as District Judge the following remarks of the Subordinate Judge who tried that case which came up as Second Appeal No. 983 of 1913 to this Court :

"All the circumstances of this case show that living in the mids of a country where Hindu usages prevail, and being probably also of Hindu origin, the family has been following the Hindu usage in practice, with regard to joint living and joint enjoyment of property. In this state of things, the Courts have a discretion to apply such of the rules and presumptions of Hindu Law which are dictated by the circumstances of the case. It must accordingly be held that in this case, the plaintiff and the other shares will be bound to contribute their shares of the debts which may be found to have been incurred for the family benefit and still outstanding. Although there is no rule of Muhammadan Law imposing such a charge, it may be fairly presumed that it is *one of the incidents of the commensality that obtained in the family.*"

Myself and Mr. Justice Bekewell confirmed on second appeal the above decision of Mr. Justice Spencer given by him as District Judge of Tanjore.

In the present case not only did the two brothers Haji Hassan and Hammed Saheb live and conduct business amicably together between 1848 and 1865 when Hammed died, but the properties purchased *in the name of either*, were enjoyed by both. Exhibit XIX is a title-deed of a property purchased in the younger brother's name in 1849. Exhibits XVIII and XX are title-deeds of properties purchased in Hammed Saheb's name in 1844 and 1846. All these properties were treated as joint family properties by both brothers. [As even their Lordships of the Privy Council have used the expression "joint family" in more senses than one as pointed out by Sir C. Sankaran Nair, J., in *Rama Row* v. *Raja of Pittapur* (11)], I have ventured to use the expression joint family properties in the case of the Mussalman families without intending the expression to involve all the usual implications when applied to an undivided Hindu joint family.

(9) (1870) 2 M.H.C.R. 414.
(10) (1877-78) 3 Cal. 694.
(11) (1915) 29 I. C. 356.

Upon the death of Haji Hassan in 1870, the whole property of the family, including these three properties, was registered in the name of Dodda Moideen, the son of Haji Hassan who was then the manager in Manki. The accounts of the business which had stood in the name of Haji Hassan alone, were carried on from 1871 to 1882 in the joint names of Dodda Moideen, son of the elder brother, and Abdul Rajack, the son of the younger brother. The names of other male members of the family were introduced into the accounts in subsequent years. In the genealogical tree, Exhibit B, prepared by the village officers of Honawar Taluk in 1889 and in the statement Exhibit C, taken from all the members of the family, it is implied that Haji Hassan and Hammed were co-owners, just as if they were two Hindu brothers who carried on business and acquired properties together. It is further implied that there should be a manager selected from among the members of the family consisting of the heirs of the brothers as if those heirs constituted a joint Hindu family. The trade business was carried on at Souda, while the properties were acquired mostly in Manki. As the District Judge says:

"Numbers of documents relating to the plaint properties have now been produced to show in whose names they were purchased and it is noticeable that the man on the spot and managing the business often took the document. Exhibit R. of 1891 shows that Sanna Hassan received an amount decreed to Abdul Rajack. Exhibit Q of 1893 shows that Sanna Hassan who was then conducting the trade in Souda, obtained in his own name a succession certificate to collect the trade debts. Exhibits Y, BB and CC are documents to Sanna Hassan for old debts due to the trade and for rents due to the family. Exhibit DD is a document of 1904 to the 11th defendant, then managing the trade, in renewal of an old document, Exhibit Z, of 1886 to Abdul Rajack, showing that the manager for the time being, regardless of his branch, got documents in his own name; Exhibit T is similarly a document to Alli Sahib (15th defendant), reciting a prior debt due to his father Abdul Rajack; Exhibit AA, a document to the 11th defendant, refers to his uncle Abdul Rajack as the manager at Souda; and Exhibit W similarly refers to the 15th defendant."

These Exhibits distinctly tend to show that the two branches regarded themselves as equally entitled to all the properties standing in the name of any male member in either branch. The oral evidence is also to the same effect.

In the account XXII Series (See pages 100, 107, 108, etc., of the printed papers), salutations to ganapathi and sometimes salutation to "Sri" occur, showing that the influence of Hindu customs has permeated the community to a rather extraordinary extent. Even in the case of Hindu joint family business, the law applicable is rather complex and by no means quite settled. In *Bishambhar Nath* v. *Fateh Lal* (8), it is said in page 183:

"A joint ancestral family business under the Hindu Law managed by the adult members of the family differs from an ordinary contractual partnership. In the case of the latter, each partner is a contracting party, all the partners holding themselves out as trading on the credit of their combined and separate funds, whereas in the case of a joint family ancestral business, there is no *contract* of partnership whatever between the members of the joint family. The family frequently contains amongst its members, minors who acquired their interests in the business by birth. Indeed it may be safely assumed that in most of the existing Hindu joint family trading firms, the parties, now interested in them acquired their interest by birth and not by contract Admittedly, minor members are liable to the extent of their respective interests in the joint family property for the acts of the managers of the joint family business. But we do not think that their liability extends further. If any of the members of a joint family, happen to have separate estates, we know of no good reason why such separate estates should be held so liable."

Of course, "the legal individuality of a co-parcener is not merged in the manager, so far as the co-parcener's self-acquired or other separate property is concerned." [See *Chalamayya* v. *Varadayya* 9)]. Thus in a Hindu joint family business in which the minor agnates get interests as soon as they are born, the sections of the Contract Act relating to the dissolution of a partnership by the death of a partner and the necessity of the consent of a male member to make him liable as a partner even to the extent of the interest of his deceased father in the

family partnership business for debts contracted after his father's death, are not applicable. In a Hindu joint family partnership business, it is only the male agnates that become partners (though not in the full sense of the expression "partner") liable to the extent of the funds of the partnership business. The matter is further complicated in the case of this *Navayat* community by the female heirs and the numerous members of each heir (whether male or female) under the Muhammadan Law, of a member of the original partnership, obtaining an interest in the partnership business on the death of each member of the family firm and of any heir of that member. But I think that till an heir or the heir of an heir repudiates all further rights and liabilities arising from the future transactions of the firm, he or she becomes and continues a partner in the sense that though he or she may not be personally liable for the debts of the firm, his or her interest in the partnership assets, continues liable till a partition is effected or till a repudiation takes place. As said in some cases, the minor who gets an interest in a Hindu partnesship firm by birth, cannot be considered a partner in the sense that he becomes personally liable on his attained majority for the debts of the firm contracted during his minority, but still he might be termed a partner in a real sense as his share and interest in the family business is liable for the debts contracted by the managing partners. In the case of *Navayat* families, I think that the expressions 'joint family' and 'undivided family' are used in a very loose manner as if female heirs also are members of the 'joint family' or 'undivided family.' But, so long as the family business is continued without break and though female heirs and minor heirs and heirs belonging to other families, may not be partners in the strict sense of the term, their interests in the firm's assets continue liable and the value of their interests fluctuates according to the prosperity or otherwise of the firm. I, therefore, venture to think that Ss. 241, 249 and 253, (clause 10) and similar sections of the Contract Act may not be inapplicable to the business carried on by a *Navayat* family as a family business though the principle of survivorship and that of right by birth, ought not to be imported in considering the rights and liabilities of the persons to whom the business of a *Navayat* family has descended as heirs. I think that in most other respects, the principles and considerations applying to the business of Hindu family firm can be made applicable. On a careful perusal of Exhibits E1 and E2 and several other documents in this case, it seems to me clear that not only males in the family but all the members (male and female) in the two branches and all the heirs and the heirs of the heirs of the original two brothers Haji Hassan and Hammed Sahib have been treated by all the interested persons as members of a "joint undivided family" that is, that as the heirs and heirs of heirs in both branches have been always recognised as jointly interested in the partnership business and in all the properties acquired forming the assets of the business. I am inclined to think that if accounts have to be taken and if only working male partners are to be treated as partners in the future business on the death of each male heir, it might become a hopeless task for even the most clear-headed Judge to find out the facts and settle the rights on anything like a satisfactory basis after the lapse of even a single generation. I believe it is not quite a secret that I am not over fond of the Mitakshara joint family system with its theories as to rights by birth, survivorship, exclusion of females from inheritance (speaking generally), discouragement of claims to separate and self-acquired properties, etc., nor am I at all for the Mussalmans adopting the modern Hindu Laws of succession and inheritance or the Marumakkattayam family system, still less am I for the Muhammadan Law (which follows more closely the religious rules laid down in the Holy Quran) being given up by the Mussalmans for the later Hindu Law which has departed (through the influence of decadent custom) far from the original religious sources of the same law. While I do not agree with the District Judge that the words "undivided family" could be properly used as regards members of these two Mussalman families, I have no doubt that the business at Souda should be treated on the analogy of the business of a joint Hindu trading family, that all the properties must be treated as if they were partly belongings of the two brothers Haji Hassan and Hammed as equal co-owners and partly the accretions to such properties held in co-ownership. I am aware that neither the principle of survivorship which was introduced by the Mitakshara in the case of joint Hindu family where one of the co-parceners

dies without a male issue, nor the principle of exclusion of females (with some exceptions) from succession in Hindu Law can be applied to these Mussalman families. There is also no question of right by birth. But other presumptions of common sense arising from the mode of their living, might, in my opinion, be safely applied. That customs, even modifying the Muhammadan Law, can be applied to Mussalmans is clear from *Muhammad Umar Khan* v. *Muhammad Niaz-ud-Din Khan* (12). It was argued that the properties which had been acquired before 1870, should be divided between the two branches in the proportion of seven-eights and one-eighth. But in respect of even some of the properties acquired before 1870 in the name of Hammed, the *pattah* was transferred to Hassan's son's name, thus showing that no distinction was made even as regards those properties between the rights of the two branches.

It was finally argued that at least the properties which belonged to Haji Hassan in 1845, should be divided into seven-eighths and one-eighth. But it seems to me that all the properties were treated as if they belonged to two Hindu brothers after 1848 and it is not wholly improbable that Hammed might have mixed up whatever properties he had in 1848 (there is no evidence worth the name to show that he was an absolute pauper when he began to assist his brother) with his brother's properties inextricably. I think that this is a case in which both equity and convenience require that the principles on which Scottish Courts act and which were approved of in the recent case in *Mahomed Musa* v. *Aghore Kumar Ganguli* (13) should be applied in this case. Actings and conduct of parties might give rise to estoppel where such actings and conduct have produced alterations of circumstances so great that without great loss and inconvenience, the parties cannot be put back in their original positions. I think that from 1848 till this suit was brought, the two brothers, their heirs and the heirs of their heirs have acted in such a manner that the decree passed by the District Judge can be fully justified on the basis that all parties have understood their rights as following from the properties being held in common ownership between the two branches for more than 60 years and the imperfect understanding or agreement between the two brothers which began in 1848, has become fully perfected by their own conduct and the conduct of their heirs.

The learned District Judge, while admitting that the plaintiff has not proved that any debt was incurred by his father in building a house which is now treated as family property, and that the 22nd defendant also has not proved that he has incurred certain debts in acquiring property treated as family property, has allowed these two parties to prove in execution proceedings that they have incurred such debts. I think he was wrong in allowing those claims to be proved afterwards, and he ought to have disallowed those claims for want of proof. As regards the debt alleged to have been incurred for maintenance (after the date of this suit) by the plaintiff's branch, this also cannot be allowed as the 9th defendant's liability, after the suit is brought, is only to be held accountable for half the net income of the family received by him after the date of suit and not to be tendering maintenance amount to the plaintiff's branch. The decree passed by the District Judge is further defective in not providing for the necessary accounts to be taken and in not reserving liberty to the parties to make applications connected with the taking of the accounts, the issuing of the necessary commissions for making partition and so on. Subject to the modifications above referred to, I would confirm the lower Court's decree with costs to be paid by the appellants to the contesting respondents.

By the Court.—Under S. 98 of the Civil Procedure Code, the decision of the District Judge on issues 12 and 14 is set aside and the issues are decided in the negative. The District Judge's decree will also be modified by adding directions to take the necessary accounts and by giving permission to the parties to make applications in connection with the taking of accounts. In other respects, the decree will stand confirmed with costs of the contesting respondents. The clerical errors pointed out in grounds 38 and 40

(12) (1912) 39 Cal. 418=13 I. C. 344=39 I.A. 19 (P.C.).

(13) A.I.R. (1914) P. C. 27=28 I. C. 930 (P.C.).

of the appeal Memorandum will also be corrected by the lower Court.

S.N./R.K.

Decree modified.

A. I. R. 1916 Madras 186
Full Bench.

OLDFIELD, SADASIVA AIYAR AND BAKEWELL, JJ.

Secretary of State—Defendant—Appellant.

v.

Kannepalli Janakiramayya and *others* (*Plaintiffs*)—Defendants—Respondents.

Letters Patent Appeal No. 39 of 1913, decided on 6th August 1915, against the Judgment of Sankaran Nair, J., in appeal No. 124 of 1906.

(a) Madras Irrigation Cess Act (7 of 1865), S. 1—Combined effect of this act and Madras Land Encroachment Act is that Government are entitled to levy cess on water used of river flowing in channel belonging to another *zemindar*.

Where the *inamdars* of Varahanarasimhapuram utilised the water of the Vamsadhara river, flowing in the Mobagam channel belonging to the *zemindar* of Urlam, for irrigating second crop cultivation and wet crops grown on dry land:

Held, Per *Oldfield and Bakewell, JJ.*, (*Sadasiva Aiyar, J.*, dissenting) that under the combined operation of the Madras Act III of 1905 and VII of 1865, the Government was entitled to levy water-cess for the same.

[P. 198, C. 1; P. 205, C. 2 & P. 208. C. 1.]

(b) Madras Land Encroachment Act (3 of 1905—(Per Oldfield, J.)—Act is declaratory and hence retrospective in effect.

Per *Oldfield, J.*—Madras Act III of 1905, being a declaratory Act, has retrospective effect.

[P. 188, C. 1.]

(c) Madras Irrigation Cess Act (7 of 1868), S. 1—Person claiming exemption of water cess must prove that the water is not Government property.

A person who claims exemption from payment of water-cess under Madras Act VII of 1865 is bound to prove that the water used by him was not Government water but that of a *zemindar* or *inamdar* or a person claiming under him.

[P. 188, C. 2.]

(d) Grant—Construction—Crown grant must be construed in favour of Government.

A grant from the Crown, unlike one from a private individual, must be construed beneficially to it. 6 B.H.C.R. 191; 12 Bom. 534; A.I.R. (1915) Mad. 201, Foll.; 22. All 96, not Foll.

[P. 191, C. 2.]

(e) Madras Irrigation Cess Act (7 of 1865), S. 1—It applies to *zemindari* and *Inam* villages also

(Madras Act VII of 1865 applies not only to *ryotwari* but also to *zemindari* and *inam* villages.)

[P. 194, C. 1.]

(f) Evidence Act (1 of 1872), S. 102—Hardship to prove owing to lapse of time is no ground to accept inadequate proof in discharge of burden placed by statute.

Where by a Statute, the burden of proving a fact in issue is placed on the subject as against the Government, a Court will not be justified in presuming or accepting inadequately supported inferences in support of a grant of which direct evidence is wanting, out of mere regard for the hardship that might ensue owing to the difficulty of proving it after the lapse of several years.

[P. 194, C. 2.]

(g) Grant Proof—Allegation of grants of same manner in presidency Evidence of non-existence in two districts refutes the allegation.

Where a grant is alleged as founded throughout the Presidency in the same manner, the fact that in two districts its existence has been negatived by practice is against its validity in others. A. I. R. 1915 Mad. 619; 7 Mad. 182; 14 Mad. 44, ref. to. [P. 195, C. 2.]

(h) Evidence—(Per Sadasiva Aiyar, J.)—Historical retrospect of relation is of no value where relations between *zemindars* and tenants are fixed by statute or case-law.

Per *Sadasiva Aiyar, J.*—A historical retrospect of the relations between the Government and *zemindars* and *ryotwari* tenants, and those between *zemindars* and *inamdars* and their tenants is of little importance in arriving at a true view of the provisions of the Statute and Case-law governing their rights. [P. 198, C. 2.]

(i) Interpretation of Statute Where statute is clear consideration such as whether such hardships could have been meant or such sudden changes could have been intended is of no avail.

In construing a Statute considerations such as whether the Government could have intended to be guilty of so much harshness and oppression as would result if a particular Statute were to be interpreted in one way, or whether the Legislature could have intended such a sudden change in the law as would result from a particular interpretation, are of very doubtful utility and it is not legitimate to have recourse to such extraneous considerations, unless the words of the Statute are very ambiguous. [P. 199, C. 1.]

(j) Practice Common Law—Technicalities of common law actions are to be avoided in dealing with Indian litigants.

In deciding on the rights of Indian litigants references to the technicalities of English Common Law actions ought to be avoided as merely tending to confuse the mind. [P. 199, C. 2.]

(k) Madras Irrigation Cess Act (7 of 1865), S. 1—Meaning of "river, stream", etc., in S. 1 means collective body of water—Water is property—Word "supplied" does not imply previous request of supply.

According to Indian Law flowing water is capable of being owned. [P. 199, C. 2.]

The words 'rive', 'stream', 'channel' and 'tank' in clause (*a*) of S. 1 of Madras Act VII of 1865 are used in the sense of the collective body of waters which are called river, stream, channel or tank, according to the respective configurations of the receptacles. [P. 200, C. 1.]

The word 'supplied,' when used in connection with water-supply, does not imply a previous request by the owner of the land which is supplied with water. 12 Mad. 407; 19 Mad. 24, diss. from. [P. 200, C. 2.]

(l) Madras Irrigation Cess Act (7 of 1865), S. 1 –Right of *zemindar* who owns one bank to half the stream is well settled—In other cases it vests in village community or in sovereign power.

So far as beds of non-tidal and non-navigable rivers and streams bounded by *zemindari* and whole *inam* lands are concerned, it is too late to question the applicability of English Law that a *zemindar* who owns only one of the banks of a river is entitled to half the bed of the river along the length bounded on that side by his land. But in other cases, the Indian Common Law vests such rights in the village community as a whole within the village limits and in the Sovereign power as representing the community in other places. [P. 200, C. 2 & P. 201, C. 1.]

(m) Madras Land Encroachment Act (3 of 1905), S. 1 There is strong presumption that all standing flowing water belongs to Government —It can be rebutted—Rules of evidence take effect at once—Rule of presumption revised by this act applies to pending suits also.

Rules of evidence enacted by the Legislature come into force at once and must be followed by the Courts in deciding on the rights of the parties, whatever may have been the previous state of the law in regard to the proper presumptions and burdens of proof. Under Madras Act III of 1905, the Government starts with a strong presumption in its favour that all standing and flowing waters belong to it, but the presumption is rebuttable. The fact that the enactment was passed during the pendency of the suit does not estop the Government from invoking the aid of such presumption.

[P. 202, C. 1 & 2.]

(n) Madras Land Encroachment Act (3 of 1905, S 2 (1)—Scope of S. 2 stated—Absolute ownership in flowing water cannot vest in Government ownership exists of that water which stands on the surface owned.

S. 2 (1) of Madras Act III of 1905 has not the effect of declaring plenary rights in standing or flowing water in favour of Government. The Legislature never intended by that section to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. Flowing water *by its very nature* can never be the absolute property of the Government or anybody else, though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person. [P. 203, C. 1.]

(o) Madras Irrigation Cess Act (7 of 1865), S. 1 Right of distributing water to tenants exercised by Government is of sovereign landlord—Where proprietary rights in lands or tanks or river beds is transfered to *zemindars* proprietary rights of Government in water ceases to exist.

(The right of distributing water among their *ryotwari* tenants is exercised by the Government as the Sovereign landlord. Where, however, they have parted with proprietary rights over the beds of particular streams in favour of *zemindars* or *inamdars*, it is impossible to hold that they retain proprietary rights over waters standing in tanks in *zemindaries* or flowing through *zemindari* lands, or in water flowing in all natural channels, or through artificial channels constructed with the knowledge and permission of Government and owned by the *zemindar* or *inamdar*, or in water percolating into *zemindari* and *inam* tracts. [P. 203, C. 2.]

(34 Mad. 295; 37 Mad. 369, not foll.)

F. H. M. Corbet and *S. Sundararaja Iyengar*—for Appellant.

T. Rangachariar and *P. Nagabushanam*—for Respondents.

Facts.—The *inamdars* of Varahanarasimhapuram and the water of the Mobagam Channel, belonging to the *zemindar* of Urlam, which took off water from the Vamsadhara river, for irrigating second crop cultivation and wet crops grown on dry land in their *inam* village. The Government having collected water-cess for such use of the water, the *inamdars* filed the present suit against the Secretary of State for India for the recovery of the cess so collected on the ground that the levy thereof was illegal. They also sued for an injunction to restrain the future levy of the same. The District Judge of Ganjam decreed the suit. On appeal to the High Court Miller and Sankaran Nair, JJ., differed in opinion, with the result that the confirming judgment of Sankaran Nair, J., prevailed under S. 98 of the Civil Procedure Code. The report of the case appears in *Secretary of State for India* v. *Kannepalli Janakiramayya* (1). The Secretary of State for India in Council then preferred this appeal under the Letters Patent.

Oldfield, J.—This is an appeal from the decision of two learned Judges, given under S. 98 of the Code of Civil Procedure, in accordance with the confirming judgment of one of them, Sankaran Nair, J. The question is whether water-cess was legitimately levied by Government, the appellant, from plaintiffs for the water of the Vamsadhara river, which they have admittedly used in their *inam* village for the irrigation of (1) second crop, (2), wet (or irrigated) crops grown on dry (or ordinarily unirrigated) land. The decision of this question will be a sufficient adjudication on the plaintiffs' claims to a refund of past collections and an injunction as to the future.

(1) A.I.R. 1914 Mad. 534=37 Mad. 322=18 I.C. 770.

Plaintiffs did not dispute that they used the water of the Vamsadhara, as alleged. The dispute is, therefore, only whether it belongs to and can be charged for by Government. Government has relied on S. 2 of Act III of 1905 in support of its ownership of the water and S. 1, Act VII of 1865, in support of its right to charge for it. The material portion of the former is follows :—

"(1) All public roads, streets, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water mark and rivers, streams, *nalas*, lakes and tanks, and all canals and water-courses, and all standing and flowing water, and all lands, wherever situated, save in so far as the same are the property (*a*) of any *zemindar* . . . . or *inamdar* or any person claiming through or holding under any of them, ... are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land-owners, and to all customary rights legally subsisting."

And of the latter :

"Whenever water is supplied or used for purposes of irrigation from any river, stream, channel tank, or work belonging to, or constructed by, Government, it shall be lawful for the Government to levy, at pleasure, on the land so irrigated, a separate cess for such water, provided that where a *zemindar*, *inamdar*, or any other description of landholder not holding under *ryotwari* settlement is, by virtue of engagements with the Government, entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more."

As regards the first of these enactments, it is not material that it was passed only during the pendency of this litigation in the Court of first instance. For it is, as regards the ownership of water, a declaratory Act, and such Acts have retrospective effect (Maxwell on Interpretation of Statutes, 3rd Edition, page 309), Plaintiffs demur to its application, on the grounds that the Legislature cannot be supposed to have intended (1) to confer a right of ownership in flowing water, a thing not capable of ownership, or (2) to confiscate existing rights of irrigation or to affect them at all, when the purpose of the Act is only to justify charges for the unauthorised occupation of water and land. These objections are invalid. For (1) it is only in the last resort, and for clearer reason than has been shown, that the meaning of the general provision declaring that water belongs to Government can be nullified. For, as regards (1) the Act statedly makes a general declaration that water belongs to Government : and it is only in the last resort and for clearer reason than has been shown that I can construe it by holding that flowing water can belong to no one. And as regards (2) there is no question of taking away existing rights, but only of reserving them and assigning the burden of proof regarding them. The reference to water would be pointless with regard to its occupation as by a boat on it, the example suggested, since nothing makes such occupation chargeable; whilst the inclusion of only a declaration of ownership as to water without a machinery for charging for its unauthorised use, such as is provided for land is easily intelligible in view of the fact that the requisite machinery in the case of water had already been provided in Act VII of 1865. It will be necessary to return to the provisions of that Act in another connection. At present it is material only that plaintiffs allege no engagement exempting from water-tax the cultivation now charged for and admit that it is not included in the extent referred to in their title-deed as wet. They are, therefore, bound to prove that the water in question is not Government water, that is, that in the words of Act III of 1905, it is the property of a *zemindar* or *inamdar*, or a person claiming under one.

The plaintiffs' village, Varahanarasimhapuram, is not on the back of the Vamsadhara river, and the water reached it by the Mobagam Channel which passes through the Urlam *zemindari*. The judgment of Sankaran Nair, J., refers throughout to the village as part of the *zemindari*, but mistakenly. For it is admitted, an independent *inam* village, which was part of the Jalmur Estate and, having been bought in with the rest of that estate about 1808, is now held directly under

Government. Mr. Rangachariar for the plaintiffs has accordingly attempted to establish that the water was either theirs or the property of Urlam. He at one time proposed to argue that plaintiffs had easement or other customary rights against Urlam, which would, in some way not explained, justify them in claiming the water against Government. But this corresponded with nothing in the plaint, or, so far as the judgments showed, in the arguments at earlier stages of the case, and we refused to hear it. His contention was then that the water, being the absolute property of plaintiffs or Urlam, was, in the latter alternative, used by plaintiffs in accordance with some arrangement or license by the Urlam proprietor, the nature of which could have no bearing on the material point that the water did not belong to Government and, therefore, was not material for the purpose of his argument. That case is intelligible. It is only to be borne in mind that, so far as it relates to Urlam, proof of nothing less than absolute ownership is essential in order to sustain it. For we have been shown no authority for holding that mere riparian rights, short of ownership of the water, extend to its diversion for the irrigation of land other than that belonging to the riparian owner himself. S. 7, illustration (*f*), Indian Easements Act, negatives the wider view of such rights. The Calcutta High Court refused in *Belbhadar Pershad Singh* v. *Sheikh Barkat Ali* (2) to apply the American doctrine on the subject to India. And this Court in *Robert Fischer* v. *Secretary of State for India* (3) held that, if the English Law were applicable, the disability of a riparian owner to use water for non-riparian tenements was absolute and did not depend on proof that actual damage was caused by his doing so. Mr. Rangachariar put his case for the ownership of the river water by Urlam on two alternative foundations ; and I shall now deal with the first of them.

It was stated by Mr. Rangachariar as follows : When a river, such as the Vamsadhara, flows by a *zemindari*, such as Urlam, half the river-bed adjacent to the *zemindari*, and the water thereon belongs to the *zemindar*, and the other half to the opposite riparian owner, subject to superior riparian rights in the water. The District Judge dealt with this, apparently with the consent of the parties, by a reference to his judgment, Exhibit M in this suit, in another litigation relating to the same river and estate, Original Suits Nos. 37 and 38 of 1904, his finding being that the bed and consequently the water did not belong to Government.

That judgment was, of course, given before the Act III of 1905 and the imposition of the burden of proof on the private claimant prescribed in it became law. It is sufficient that it was based on the rejection of an argument from the alleged tidal and navigable character of the river and an inference as to the ownership of its water from the ownership of the channels conveying them to the irrigated land, which I shall deal with later. It is not, in my opinion, clear that the English and American principles relied on by Mr. Rangachariar, as supporting the ownership by the riparian owner of half the bed adjacent to his holding, can be applied to India, where Government has special rights and as regards irrigation special functions. The Indian authorities dealing with accretion are not relevant, since they are concerned, not with ownership of the river-bed, but with a special method of acquiring ownership in formations in it above water. And I am inclined to share the doubt expressed by Sadasiva Aiyar, J., in *Mukkasa Nair Veettil* v. *Secretary of State for India* (4 . A decision on this part of plaintiffs' contention is, however, unnecessary, because I do not think that ownership of the water will follow from the ownership of the bed, or the moiety of it adjacent to the holding.

It is evident that this principle must be scrutinised carefully, before it can be accepted. For its practical application would be most difficult. The right of Government, for instance, to control water for irrigation purposes has been recognised in *Robert Fischer* v. *Secretary of State for India* (3), cited above, and other cases ; but when that right is in question, whether it is general, as founded on authority, or it arises only from the ownership of the opposite bank, how is it to be exercised or limited to the control of only half the water ? and

(2) (1907) 11 C.W.N. 85.
(3) (1909) 32 Mad. 141 = 2 I.C. 325.
(4) A. I. R. 1914 Mad. 341 = 24 I. C. 547.

how is such limitation to be imposed on opposite proprietors? It is significant that no decisions appear to have been given by the Courts on claims so likely to result in controversy. As regards authority, plaintiffs rely mainly on the early doctrine, embodied in the maxim "*Cujus est solum, ejus est usque ad cœlum*," which is stated at page 78, Coulson's "Law of Waters," 3rd Edition. But they neglect the learned author's conclusion, that it is supported by modern authors only as regards standing and percolating water and running water which remains for the whole of its course on the land of a single owner, but that "with regard to natural streams flowing through adjoining lands, the enjoyment of which is only usufructuary and not absolute, the right to use the water does not arise from the ownership of the soil on the stream, but from the right of access to it which land owners on the banks have by the law of nature." It will be observed that this statement of the English Law, which I adopt, since it has not been shown to be incorrect, attributes to individuals a right of user in certain circumstances, not of ownership; and I recall the fact that, as observed *supra*, the establishment of the right to such user will be insufficient to justify Urlam in supplying plaintiffs. The Law in England as regards ownership will be made clearer by a quotation from *Embrey* v. *Owen* (5):—

"Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only that all may reasonably use it who have a right of access to it, that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only."

On the English Law plaintiffs have relied almost exclusively, as regards this part to their case, and it does not support the plenary ownership of the water by Urlam, or more than its right of user for cultivation of its own adjoining lands, and not for any supply to the lands of others such as plaintiffs. That is sufficient to negative the case of private ownership, as based on the ownership of the bed and banks, and to authorise the application of the presumption referred to in Act III of 1905. It will be convenient to postpone dealing with the Indian cases, until plaintiffs' alternative foundation for the ownership of the river water by Urlam has been considered.

It was stated by Mr. Rangachariar as being that in a permanently settled estate, such as Urlam, where a river flows through or by the estate, the river-bed and waters, to the extent to which they are in that estate, were granted with it to the *zemindar* in 1803, subject to superior riparian rights.

It is admitted that the Urlam Estate was formed out of *haveli* lands; that is, lands which, before the Permanent Settlement, were in the possession of no *zemindar*. There can, therefore, be no question of the existence of any rights, such as *zemindars* enjoyed before 1802, in this case; and it can be said at most that rights identical with those of *zemindars* elsewhere were then conferred. The *sanad* containing the terms, on which the estate was granted in 1803, has not been exhibited. But it is agreed that it is in the standard form given at page 119, Volume II, Board's Standing Orders (1907). It is conceded that it supports plaintiffs' contention in no degree directly. For it refers only to land and land assessment and makes no reference to rivers, or other water-supply, in connection with the grant. The argument is accordingly that, as the references are to land and land assessment or revenue alone, no further payment was to be made on any other account in connection with cultivation and, therefore, none on account of river water. Particular reliance has been placed on clause 4 by which provision was made for the liability of the estates for payments, in addition to the land tax, for various other articles of revenue, of which water-tax is not one, the inference being that, as such articles are enumerated and the enumeration must be supposed to be exhaustive, the omission to mention water-tax entails that none was leviable. These are the only grounds, on which it is proposed to imply a grant of all river water for irrigation, past and future, from the terms of the *sannad* itself; and they are, in my opinion, inadequate. No doubt ordinary

(5) (1851) 6 Ex. 369.

existing irrigation was granted, since payment for one irrigated crop would, in accordance with usage, be included in the total consolidated land tax or *peishkhush*, so far as it was for the wet land in the estate. That *peishkush* was, as Sankaran Nair, J., has shown in another connection in his judgment, fixed arbitrarily, and it is not possible to distinguish the portions of it payable for irrigation and land revenue proper. But that is the most that can be allowed, or with which authority and revenue practice are consistent. Extraordinary or second crop irrigation and extensions of irrigation are, no doubt, not mentioned in the *sanad*. But it is not a necessary inference that they also were included in the grant. For the intention may equally have been to charge for them separately, as has, it will be found in some cases at least, been done. As regards clause 4, the enumeration does not seem to be either exact or comprehensive. It has not, for instance, debarred Government from levying a duty on the possession of arms in *zemindaris*, or a road and railway cess for the benefit of Local Boards, although neither of these imposts comes within the descriptions of those the right to which is reserved. In *Vedanta* v. *Kanniyappa* (6), this Court dealt with the clause and the connected section of the Permanent Settlement Regulation XXV of 1802, holding that the dues, then in question, included in the *sayer* were not exigible by the owners of land as such, but by the Sovereign, and that, whatever the origin of their title, Government intended to treat the *zemindars*, with whom it effected a Permanent Settlement, as landed proprietors, and to ignore any rights which conflicted with its own sovereignty. And the judgment goes on :—

"Such a large proportion of the Crown revenues of India was derived from the land, directly or indirectly, that it was difficult for the early British Administrators to seperate with precision the revenue which could conveniently be collected by the Crown from that the collection of which could more conveniently be left to those subjects who had exercised the functions of collection under native rule."

(6) (1886) 9 Mad. 14.

and later (page 25).

"It cannot be denied that in *sanads* issued in virtue of the Permanent Settlement Regulation the Government dealt ordinarily only with the land revenue. The insertion in *sanads* issued by the Government of Madras of a clause repeating the declaration contained in the Regulation as to the exclusion of items of revenue other than the land revenue was surplusage. . . . . Had the clause been omitted, it could not have been contended that the *zemindar* was entitled to collect revenue other than the land revenue, because of its omission."

All this enunciates what the wording and matter of *sanad* and Regulation indicate, that the Settlement proceeded on general lines and that a grant of one item of revenue is not to be inferred from silence regarding it. Such an inference, it must be added, is intrinsically improbable. For whatever the actual irrigation in 1802 under the great deltas of the Kistna and Godavari, it cannot be supposed that their potentialities were overlooked or dealt with by implication, or that, if they had been transferred, there would have been no attempt in the *sanad* and Regulation, or by some other contemporaneous enactment, to provide for responsibility for their control, or the decision of conflicting claims to their waters. The grant under construction was made by the Crown; and the rule of construction in point is not, as it was in *Balbir Singh* v. *Secretary of State* (7), that applicable to the grants of a particular description of property, but the general rule, that grants by the Crown must be construed beneficially to it. *Vaman Janardan Joshi* v. *Collector of Thana* and *the Conservator of Forests* (8), *Collector of Ratnagiri* v. *Antaji Lakshman* (9) and *Adusumulli Suryanarayana* v. *Acchutta Potanna* (10). These, the direct and in my opinion, the only legitimate grounds for a decision, because they alone are available from the actual terms of the grant, entail that no grant of the river water to the Urlam proprietor in 1803 is established.

(7) (1900) 22 All. 96.
(8) (1869) 6 Bom. H.C. R. 191.
(9) (1888) 12 Bom. 534.
(10) A. I. R. 1915 Mad. 201=38 Mad. 608=22 I. C. 339.

Direct construction of the grant yielding nothing favourable to the plaintiffs, they have endeavoured to support their case further by collateral considerations; and they have, it will be found, made similar attempt in connection with their proposed interpretation of Act VII of 1865. Those considerations consist in the alleged opinions and intentions of Government and its officers at the time of the Settlement, as expressed in various publications. I do not think that they are a legitimate ground of decision with reference to S. 93, Indian Evidence Act, of the general principle that, if "the language of the Statute admits of no doubt or secondary meaning, it is simply to be obeyed, without more." Maxwell on Interpretation of Statutes, 3rd Edition, page 72. Here the fact that the *sanad* makes no reference to a topic to which it might have referred, does not render its language ambiguous or defective; and the Regulation and Act are, in my opinion, susceptible of a reasonable interpretation as they stand. I, therefore, enter on this branch of the argument solely because it has bulked largely here and in the judgment of the learned Judge.

It is a difficulty of a different kind that the matters in question were (as plaintiffs' learned Vakil admits) never relied on at the trial in the District Court or the hearing of the appeal, when Government might have dealt with them by explanation or countercitation, but were first referred to in the learned Judge's judgment. The learned Advocate-General has, however, waived objection to them on that ground, claiming only the right to file documents in reply in case, we think, that such reply is required, and filing Civil Miscellaneous Petition No. 1862 of 1915 for their admission. We have not thought them necessary; and we need only add that we felt bound to refuse to allow plaintiffs' Vakil to make further references for the first time at this stage in the case to other publications, including Baden Powell's "Land Tenures" and Volume LXV of "Records printed for the Madras Government."

It is not necessary to reproduce the extracts relied on, as the greater part of them are given in the learned Judge's judgment. The inference from them must be weak, since they consist in the broadly expressed opinions and pious expectations of bodies so diverse as the Select Committee and the Famine Commission of 1880. The general argument in Court and in the learned Judge's judgment, so far as it is distinguishable from that based on the terms of the *sanad* already dealt with, seems to me to require more definite support from evidence than it has been given. In particular the assertion that some *zemindars* had rights over rivers before the Settlement of 1802 and retained them after it and the attempt to corroborate that by reference to the transfer to other *zemindars*, of which Urlam is one, of the duty of maintaining and constructing tanks and water-courses in *haveli* lands, are open to question. For the present dispute which relates only to rivers, which are not mentioned in connection with *haveli* lands and the ownership of tanks, to which (for all that appears) the watercourses referred to may have been appurtenant and of the water in them would be subject to quite different considerations, with which we are not concerned. For the rest, only three conclusions, which, in my opinion, require notice, have been drawn from these materials and I do not think that they in any way probablise the grant of river waters alleged. They are that (1) renters were expected to develop the lands entrusted to them by improving the channels and other works transferred to, or left in, their control; (2) it was hoped that cultivation would be extended over land waste at the time; (3) there was an impression that the existing supply of water would be continued. But as regards (1) it has still to be decided, with reference to the authorities to be referred to, whether the assignment to renters of the duty of maintaining channels would involve any exemption of water-flowing through them from charge, or any transfer of its ownership; (2) if an extention of cultivation was anticipated, it did not follow that the renter's profit was to accrue from his charging for water and not merely for the land and, unirrigated cultivation being common throughout the Presidency it need not have been assumed that the new cultivation would be irrigated or would be irrigated gratuitously; and (3) if the continuance of existing irrigation was secured, that did not entail the grant of free additions to it. On the other hand, if evidence of this

description is to be considered, it is significant that no more direct reference to anything approaching a plenary grant of the river water has been found, if one in fact was made, and that the one statement regarding irrigation works in the Instructions to Collectors, that at page 331, Fifth Report, refers only to tanks and water-courses, not to rivers, or works on them. In these circumstances I do not think that this line of argument, if admissible, assists plaintiffs appreciably.

There is, *next*, a contention that Act VII of 1865 is either inapplicable to charges for river water in *zemindar's* and *inam* villages, or that its wording is consistent only with a grant of rights of ownership in river water to *zemindars* and *inamdars* before its date, on the grounds that (1) the Act was passed in view of the necessity for realising returns from the lately constructed Kistna and Godavari anicuts and not in order to charge irrigation from private sources, where no improvement in or addition to those sources had been made; (2) it applies to rivers in *ryotwari* tracts only, not in *zemindaris*.

As regards (1) I do feel at liberty to interpret an Act the body of which is clearly and comprehensively expressed, with reference to the alleged motives of the Legislature. We have been referred to the preamble; but it can be treated as indicative of the scope of the Act, only when legitimate doubt regarding the latter arises from the uncertainty of its terms; and I feel none here. Moreover, it is not clear that the preamble in this case justifies any conclusion. It, no doubt, refers to the necessity for "a fit return" being made to Government "on account of the increased profits derivable" from works constructed or improved by it, but the reference to both drainage and irrigation works, as the preliminary to provisions which authorise a charge only for irrigation, makes it doubtful whether any accurate statement was attempted; and in the absence of any subsequent provisions for the calculation of the charge to be imposed with exclusive reference to the expenditure on some new work or improvement with which the irrigation can be connected, it is impossible to hold that the right to charge is restricted to cases in which such connection can be established, or that other cases were intended to be exempt because of a previous grant of river water or for any other reason.

Then as to the alleged restriction of the operation of the Act to charges for river water in *ryotwari* tracts, that again is based solely on inference, though it would have easily been susceptible of direct expression. It is urged that section I must not be read as applicable to *zemindaris* and *inams*, because, but for its proviso, it would authorise the charging even of irrigation in respect of which an engagement with Government exists, a result so unjust that the Legislature cannot be supposed to have contemplated it, and that the proviso is useless to exclude this result, because it cannot apply to irrigation in *zemindaris* and *inam* villages, since the term "supplied," which is used in it, not "supplied or used" as elsewhere in the sections, is inappropriate to those tracts, inasmuch as it connotes a previous request for water which *zemindars* and *inamdars* do not and need not make. This attenuated line of construction must be distrusted, if only because its acceptance would leave it doubtful what class of cases the proviso was framed for. But in fact it rests entirely on the distinction between supply and use drawn in *Venkatapayya* v. *Collector of Kistna* (11) and *Krishnayya* v. *Secretary of State* (12). It is not necessary for the present purpose to consider whether those decisions were correct. For they dealt with *ryotwari* cultivation in the Kistna District. In that district, as I shall show immediately, Government was at that date insisting on its rights, and under the rules for levy of water cess on *zemindari* and *inam* lands in the Kistna and Godavari deltas at page 2, Board's Standing Order, Volume II (1907), landholders or the cultivators under them immediately concerned were being required to submit previous applications for the use of water. The interpretations of the term "supply" and the distinction now relied on between it and "use" would, therefore, have had no such implication in the district in which these decisions were given as that now suggested; and it may be doubted whether they would have been adopted if the cases had come from other districts,

(11) (1889) 12 Mad. 407.
(12) (1896) 19 Mad. 24.

such as Ganjam, than now in question. I, therefore, find no difficulty in applying the proviso generally to land irrigated under an engagement and the Act, as a whole, to river irrigation in *zemindaris* and *inam* villages.

Something has been said, in this and other connection in argument and in the learned Judge's judgment under appeal, of the history of the relations between Government and the *zemindars*. It is argued, for instance, that the "engagement" in the proviso just referred to cannot have been merely for the exemption of lands cultivated wet in 1865, because it would have been impossible to distinguish for that purpose the extent of wet cultivation on which, with other assets, the *peishkush* was fixed in 1803. In some cases again it is known to have been fixed then on the extent of cultivation as ascertained before 1786; and it is not to be supposed that the increase between that year and 1802 would have been left out of the calculation, if the extent in 1802 had been intended to bind the *zemindar* or Government in future. And similarly, to quote the learned Judge, "if the *zemindar* is now made to pay cess for the excess area (over that allowed as wet at the Settlement), he cannot now localise the area, if any, then under cultivation, so as to demand their contribution from the tenants of the excess area." And reference has also been made to the failure of Government in this case to make any demand for many years up to 1894. These arguments, however, are not relied on as supporting any plea of prescription or estoppel against Government, but as relating to conduct which will throw light on the meaning of the *sanad*, Regulation and Act and the meaning of "engagement" in the last mentioned; and I deal with them only on that basis, and, as before, rather because the learned Judge has relied on them than because they are, in my opinion admissible. *Firstly*, as to *peishkush*, the particular facts referred to by the learned Judge appear to have been among those imported into the case in this judgment. But, accepting them as given, I cannot, with all respect, see how they prove more than that the *peishkush* was fixed in some *zemindaris* in more and in others in a less arbitrary way; and I cannot, even in the case of the latter such as Pittapur, draw any inference from the omission to bring sixteen years' wet cultivation into the calculation. It is common ground only that at least wet cultivation existing before 1802 was included in it and became exempt from separate charge. When the calculation was, it is admitted, in all cases inexact and differed only in the degree of its inexactitude, it is conceivable, as matter of conjecture, that either, as plaintiffs contend, the potential right to the use of water in the future was included in the grant, or that it was reserved to be the subject of future arrangement, which was never made. But the choice between these two theories must then be made on the considerations already set out. It would appear to be true that no effort was made contemporaneously with the Permanent Settlement to identify and register that is to localise, the particular fields entitled to irrigation at its date. The omission was, no doubt, unfortunate and has led to litigation; and the hardship may, no doubt, be real as between the *zemindar* and his tenants, when the former has to select from the latter the individuals from whom he will recover what he has paid to Government. But similar hardship must ensue and presumably is taken into account in connection with every Statute by which the burden of proof is placed on the subject against Government and has to be discharged after the lapse of years; and that fact cannot justify the Court in presuming, or accepting inadequately supported inferences in support of a grant, of which direct evidence is wanting.

There is, moreover, evidence available, which, if this line of argument is legitimate deserves consideration, since it consists in rules published by Government, which are, it is to be presumed in the absence of anything to the contrary indicative of the extent to which Government has claimed and *zemindars* and *inamdars* have acquiesced in a restriction of free irrigation, irreconcilable with these arguments. The theory of a grant of free irrigation from rivers in 1803 was, no doubt, stated by Mr. Rangachariar, as I gave it above, as confined to those *zemindari's* through which the river in question flows. But that restriction was frequently lost sight of in argument and does not appear to have been recognised in the judgment under appeal, the contention dealt with in it being for a general grant in 1802 of exis-

ting irrigation and such further irrigation as might ever be made available, without reference to the proximity of any part of the *zemindari* to the source. And naturally so. For the restriction can have no logical foundation when the grant is not supported with reference to riparian ownership and every argument for it which has been adduced would be equally valid, if the broader statement in the learned Judge's judgment had been in question before us. It will then be materially against plaintiffs, if it can be shown that some *zemindaris* have been subjected to the charge for water for many years inconsistently with the grant which they allege as made to all and with their interpretation of Act VII of 1865. That, however, has been the case as regards the large *zemindaris*, including Nuzvid and Pittapur in the Kistna and Godavari Districts, under rules published originally in 1861, and re-published last in 1906, which are printed in the judgment of Sankaran Nair, J., in *Zamindar of Kapileswarapuram* v. *Secretary of State* (13) and page 2, Board's Standing Orders, Volume II (1907), R. 10 of the original rules and R. 6 of the later, no doubt, restrict liability to water-tax payable on lands charged as irrigated at the time of, or possessed of means of irrigation before, the construction of the anicuts. But the reason for this restriction, the effect of which was discussed in the case abovementioned, is presumably to be found in the difficulty, already referred to, of determining what land was and was not irrigated at the date of the Permanent Settlement, not in any consciousness that land newly irrigated since it would not have been liable to charge in consequence of the *zemindar's* ownership of the river water. For if that ownership had been tacitly admitted, it would have been impossible to do what the rules certainly provide for ; that is, to treat *zemindars* as liable for any charge for river water at all. It is not, it should be pointed out, possible to regard the charge under the rules as made in consideration only of the part played by the anicut in making the water available and as supplementary to a water rate imposed and retained by the *zemindar* on account of the water itself. For, it is not suggested and it is not, I believe, the case that any such payment is made to the *zemindar* by the actual cultivator, though evidence of such a payment should have been available to support plaintiffs' argument, if it corresponded with facts. Moreover, the tenancy law in force at different times in the Presidency, S. 11 (4), Act VIII of 1865, and Ss. 30 (3) and 33, Act I of 1908, would discountenance such a pretension on the part of the *zemindar* ; *vide* also *Bachu Ramesam* v. *Nukala Bhanappa* (14) and *Narasimha Naidu* v. *Ramasami* (15). When, as is the case, the grant in 1803 is alleged as founded throughout the Presidency in the same manner, the fact that it has been formally negatived by practice in two districts, in which the rights of Government have been continuously asserted, is against its validity in others, where they have not.

The conclusions reached are against the establishment of the alleged grant in 1802 either directly or indirectly with reference to the wording of Act VIII of 1865, or, if the evidence is admissible, the conduct of Government and the expressions of contemporaneous opinions and expectations relied on. It remains to deal shortly with the cases, so far as they are in point, with reference to each of the foundations on which plaintiffs' claim has been argued, the ownership by Urlam of the river-bed and the grant. I have reserved both classes of cases for treatment together, because both are subject to the same observation, that they rather show the vexed nature of the questions in issue than support the existence of a current of affirmative authority in respect of them. For the earlier really decide very little and the latter contain hardly any attempt to reconcile the conflicting opinions, which have been expressed.

The only early case as to the claim based on ownership of the river-bed is *Narasimha Sastrial* v. *Secretary of State* (16). In it the claim, as originally made, was as wide as plaintiffs'. But in second appeal that was abandoned, and the decree allowed merely the right of a riparian proprietor to a reasonable use of the water. The legitimate extent of such reasonable use was not defined ; there is

(13) A. I. R. 1915 Mad. 619=37 Mad. 355 note=26 I. C. 590.

(14) (1884) 7 Mad. 182.
(15) (1891) 14 Mad. 44.
(16) (1891) 1 M.L.J. 167.

nothing to suggest that it included what plaintiffs here require, the right to irrigate the land of others; and the fact that Government claimed only the right of a lower riparian proprietor is immaterial, since a wider claim would have resulted in no more favourable decision. On account, it may be, of some systematic and novel attempt by Government to assert its rights, the other decisions on this part of the argument and the majority of those relating to the grant date from 1908. *Robert Fischer* v. *Secretary of State for India* (3), recognised the paramount right of Government without reference to Act III of 1905, not only to regulate river water, but also to ownership in it, since, after deciding that any surplus of water after the *zemindar's* customary requirements had been satisfied was at the disposal of Government, the learned Judges held that the paramount right of Government under the law of the Presidency was independent of the ownership of the bed of the stream. In *Secretary of State for India* v. *Nautheswarar* (17), the plaintiff was an *inamdar*, but it is admitted that his rights would be identical with those of a *zemindar;* and it was held immaterial that the natural stream, which was in question, had been swelled by rain water. The conclusion was in favour of Government, and it was observed that Act VII of 1865 is not based on any theory of the ownership of the bed of a watercourse beieg the foundation of a right to use the water free of charge. *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) was decided in appeal against the judgment in the case already referred to, as containing the District Judge's finding on this point, and is statedly dissented from by Sankaran Nair, J., in his present judgment. The conclusion in favour of Government is based on Act III of 1905 and a statement that the owners of land on the river banks do not own its water. So far the current of authority is clearly in favour of Government. But in *Secretary of State* v. *Kannapalli Vencataratnammah* (19) the Court decided for plaintiff, on the ground that the ownership of water from a Government source followed the ownership of a branch channel by which it was conveyed. *Ambalavana Pandara Sannadhi* v. *Secretary of State* (20) was referred to, but in it the ownership of the branch channel was not established and it was unnecessary to consider what its effect on the ownership of the water would have been. So far as *Secretary of State* v. *Kannapalli Vencataratnammah* (19) is in point (for it refers only to a channel carrying Government water, not to a river), its authority is impaired by the fact that it does not take account of Act III of 1905, or the reference to water, as well as water-courses, in it and makes no reference to other cases already mentioned. In *Secretary of State* v. *Ambalavana Pandara Sannadhi* (21) the judgment adopted the positions as to the effect of Act III of 1905 and the connection between ownership of the river-bed and water now under consideration, though it may be observed that the finding as to the plaintiffs' right to water sufficient to fill his tanks would have been ground for a decision in his favour. Vide *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (22). Lastly, there is the judgment of Sankaran Nair, J., in *Secretary of State* v. *Simhadri Jaghapathiraju* (23) to the same effect, whilst the other learned Judge concerned, Spencer, J., did not, if I understand him correctly, express a definite opinion on either point. The safe conclusion from these authorities is, I think, only that the theory of a connection between the ownership of the river-bed and water is recent growth and that the affirmative reasons which are necessary in order to support it and to displace the earlier decisions have not been given.

The first case relied on as supporting a grant in 1803 is *Ponnusawmi Tevar* v. *Collector of Madura* (24); and there is, no doubt, some language used, particularly in the judgment of Innes, J., which implies that a transfer of the right to use the water in a channel was the basis of the decision. But he connected that transfer, not with the Permanent Settlement, but with the acquiescence of Government in the plaintiff's enjoyment

(17) (1911 34 Mad. 21 =6 I. C. 199.
(18) (1911) 34 Mad. 295=8 I. C. 67.
(19) A. I. R. 1914 Mad. 482=37 Mad. 364*n*= 15 I. C. 594.
(20) (1905) 28 Mad. 539.
(21) A. I. R. 1914 Mad. 552=37 Mad. 369*n*= 18 I. C. 294.
(22) (1894) 4 M. L. J. 350.
(23) (1915) 26 I. C. 692.
(24) (1869-70) 5 M. H. C. R. 6.

of what had become a customary right. And there is a caution to be observed in the application of this and other cases to the question before us, that references to and findings in favour of a right to water do not necessarily relate to water free of charge, or deal with more than the right to water from a particular source or provided in a particular way. Thus in the case under consideration the plaintiff's right to free irrigation was never disputed, Government alleging that other sufficient provision had been made for it; and the decision is, therefore, irrelevant to the present argument. In *Maria Susai Mudaliar* v. *Secretary of State for India in Council* (22) and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (25) *mittahs*, parts of *zemindaris* granted in 1803, were in question, the irrigation being by artificial channels taking off from rivers; and these cases are relied on by the plaintiffs, though the estates were not riparian. But the rule laid down in general terms gave no support to their contention, since it was that the only undertaking to be implied from a grant of land by Government is one to supply water free of charge to the extent of the accustomed flow at its date, that flow in the earlier case being measured by the capacity of tanks, which the proprietor was entitled to fill, and in the later by the extent of land irrigated. In *Secretary of State* v. *Ambalavana Pandara Sannadhi* (21), there is nothing to show whether this principle was referred to in argument; and it is not referred to in the judgment, parts of which appear inconsistent with it. The argument based on a grant in 1803 made its first clear appearance in *Kandukri Mahalakshmamma Garu* v. *Secretary of State for India* (18) in which in fact the Urlam proprietor was plaintiff; and it is significant that it was postponed so long. It was rejected shortly the Court describing the only engagement involved in the Permanent Settlement as it was described in *Secretary of State* v. *Ambalavana Pandara Sannadhi* (21) and as it has been earlier in this judgment, "that the *peishkush* being fixed with reference to the area under irrigation, no further charge for the use of water should be made in respect of that area." There is next the judgment of Miller, J., in the case before us in favour of Government, *Zamindar of Kapileswarapuram* v. *Secretary of State* (13) relates to the Kistna District and has already been discussed. My conclusion is that the recognition of a grant in 1803 is of recent date, though it is not clear how for the earlier decisions incompatible with one were given after any such full argument far the contention as has subsequently been put forward. In the circumstances I can only hold that authority, if it does not support, is no obstacle to the decision I have come to.

The result is that neither the right of Urlam to the river water, whether as founded on ownership of the river-bed or on grant in 1803, not plaintiffs' right, so far as it is alleged to be derived from Urlam, has been established. The presumption in favour of Government ownership, authorised by Act III of 1905, must, therefore, be made.

The remaining ground, on which Mr. Rangachariar argued the case, was an assertion of plaintiffs' direct ownership of the water. In consequence of the misapprehension of their position by the learned Judge, it is not distinctly referred to in his judgment; but it was stated before us as being that, where there is a channel taking off from a river and it is at the time of Settlement part of the irrigation system of the estate, then, whether or no that channel runs entirely through the estate, it and all the water in it belong to the estate, subject to the customary right of others. In the present case the Mobagam channel, that in question, no doubt, runs through the plaintiffs' *inam* village after running through part of the Urlam *zemindari* and before running through a Government Village. But then we have the finding of the learned District Judge, which we have been shown no reason for dissent from, that there is practically no evidence to show that the channel was dug by plaintiffs' ancestor, or that any repairs were executed by them or their fellow-*inamdars* on it, or of any title of plaintiffs or their ancestor to it. In these circumstances it is impossible to hold what plaintiffs' argument requires, that the channel is part of the irrigation system of their village. Further, if any part of the channel were plaintiffs' property, the conclusion already reached, that the river water is the property of Government, would be valid against them; and we have been shown no reason for hold-

(25) (1910) 34 Mad. 366=8 I. C. 357.

ing that Government water becomes the property of any individual who succeeds in bringing it into a channel on his land. That position would, no doubt, be justified directly by the case of *Secretary of State* v. *Kannapalli Venkataratnammah* (19) already referred to, and indirectly perhaps by other cases which I have declined to follow. It is, however, negatived by the statement in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) :—

"It does not follow, because the *zemindar* provides the necessary channels to enable the irrigation of the *zemindari* lands, that although those channels carry water supplied from a river or channel belonging to the Government, the irrigation is nevertheless exempt from water-cess ;" and the same conclusion is also supported by other cases among those already dealt with. It is to be observed that the plaintiffs have not and probably could not have based their right to water without charge as distinguished from mere supply of water, on custom. The decision on plaintiffs' claim, as based on their own independent right to free water, must also be against them.

I would for the foregoing reasons allow the appeal, dismissing plaintiffs' suit with costs throughout.

Sadasiva Aiyar, J. – It is unnecessary for me to state in detail the facts and contentions fully set out in the judgment of Sir Sankaran Nair, J., under appeal.

I might begin by saying that when two very learned Judges (Sir Leslie Miller and Sir Sankaran Nair have differed on a question of law, after each of them had bestowed an extraordinary length of consideration to the matter, it is with great diffidence that I express my own opinion on the question on which they have differed.

I wish in the first place to clear the ground by a few short remarks on questions which are not either relevant or very remotely relevant to the points to be decided in this case and also on certain arguments advanced on both sides, which to my mind, are of dubious soundness.

(A. 1). The proviso to S. 1 (*b*) of the Madras Act VII of 1865, which refers to engagements with the Government by *zemindars*, *inamdars* or other landholders, need not be considered in this case. What the engagement of a *zemindar* or *inamdar* with the Government is, how it is to be ascertained, whether the area mentioned in an *inam* title-deed as wet is binding on the *inamdar* or the Government and several similar questions connected with this matter have been considered in numerous cases, of which the latest was decided by my Lord the Chief Justice and Mr. Justice Srinivasa Aiyangar about ten days ago in *Secretary of State* v. *Sri Perarulala Ramanuja Geer Swamigal* (26).

(A. 2). A historical retrospect of the relations between the Government and the *zemindars*, between the Government and their *ryotwari* tenants, between *zemindars* and *inamdars*, between *zemindars* and their *ryots*, between the *inamdars* and their tenants, of the conflicting claims as to the ownership and proprietary rights over the soil made by each of these parties, of the claims to communal lands and so on and so forth, seems, in my opinion, to be of little assistance in arriving at a true view of the provisions of the Statute and Case-Laws which now mostly govern the rights of these parties. Historical reductions almost always differ according to various idiosyncracies, syampathies and prejudices of the students of historical data. Further, the rights of *zemindars*, as they once existed or are alleged to have existed, cannot affect for better or worse their present rights. I am, therefore, unable to agree with the argument of the Advocate-General based on historical data that a *zemindar* has now no proprietary right in the soil of the lands enclosed within his *zemindari* limits, the argument being that as at one time he was a mere farmer of revenue under the old indigenous Governments, his claim to proprietorship of the soil of *poramboke* lands should be now negatived. Nor do I attach much weight to the contentions of Mr. Rangachariar based on the sovereign rights which are alleged to have vested once upon a time in *zemindars*, such sovereign rights being alleged to include absolute powers of disposal of all lands within their territories, regulation XXV of 1802, S. 2, vests the proprietary right over the land within a *zemindari* in the landholder, although that proprietary right may be subject to the communal rights of the villagers and to the occu-

(26) (1915) 30 I. C. 605.

pancy of *ryots*, all which rights are now protected by Statute Law, that is by the Estates Land Act and other Acts. Numerous cases both in this Presidency and in Bengal (where permanent *sanads* were issued in practically the same form as in Madras) decided by the Privy Council and by the High Courts of Madras and Calcutta have established the rights of the owners of permanently settled estates over the beds of the rivers passing through their *zemindari*, over the forest lands and hills, and over the mines and minerals found within the *zemindari*, and over the tanks and the fisheries in the tanks and over the waters therein, that is, they have, in my opinion, established the rights of the *zemindars as proprietors* of the *poramboke* lands within their *zemindari* limits. The *inam* title-deeds for whole *inam* villages granted by *zemindars* prior to the Settlement and confirmed by the Government (both prior to and at the time of enfranchisement) also vest the proprietary right in the *poramboke* lands (in *inam* villages, subject, of course, to the customary rights of the *ryots* and residents) in the *inamdars*; and the Case-Law has, in my opinion, uniformly recognised that right of the *zemindars* and *inamdars*. The judgment in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State far India* (18) has accepted this position, so far as proprietary rights over *poramboke* lands are concerned. [See also *Ponnuswmi Tevar* v. *Collector of Madura* (24) and *Narasimha Sastrial* v. *Secretary of State* (16)].

(A-3). The consideration of the questions whether the Government could have intended to be guilty of so much harshness and oppression as would result if a particular Statute were to be interpreted in one way, and whether the Legislature could have intended such a sudden change in the law as would result from a particular interpretation,—the consideration of these questions, in my opinion, is of doubtful utility unless the words of the Statute are so very ambiguous that it is legitimate to resort to such extraneous considerations. Speaking for myself, I am not satisfied that there is in this case justification for resort to such extraneous considerations. Further, what might be deemed harshness and oppression on the part of the Government by a mind holding conservative views as regards the sacred rights arising from individual property in land might be considered by a mind with socialistic leanings (socialism, except of the very extreme kind, not being a heretical doctrine in these days) as the proper beneficial exercise by the Government (representing the public communal interests) of its right to get the benefit of unearned increments and of the performance of its duty to utilize the sacred inalienable claims of the people as a whole to the common enjoyment of the benefits arising from all the lands within a State. I shall, therefore, dismiss from my mind the arguments of Mr. Rangachariar based on the alleged glaring inequity and injustice of trying to get some more revenue out of *zemindars* and *inamdars* after the solemn promises alleged to have been made to them by high officers of Government several decades ago.

(A-4). Further, I do not feel much pressed by the wide language used in old English cases and relied on by Mr. Rangachariar as to no individual human being being entitled to claim ownership of flowing or standing waters, as water standing on or flowing over land (in this respect resembling the air of the atmosphere) cannot be made the subject of ownership until it is separated in vessels or solidified into ice and severed and appropriated as a moveable. Mr. Rangachariar quoted English text-books and cases in support of his contention. Under the old English Common Law, it seems that as water is neither land nor tenement, it cannot be sued for *separately* in a real property action under the name of water or by measure, so long as it is standing on or flowing over land, although the land which underlies it may be the subject of a Common Law action. I think that references to the technicalities of English Common Law actions merely tend to confuse the mind when it has to decide on the rights of Indian litigants. I shall, therefore, not deal with the arguments based on antiquated forms of action. The Indian Legislatuie in Madras Act III of 1905 has made reference to the "property" rights not only of Government but of *zemindars*, *inamdars*, Government *ryots*, Malabar *jenmis*, etc., in standing and flowing water, and Indian Courts must recognise such "property" rights so far as they are recognised by the Indian Legislature. Further, the use of the wide words "owner,"

"property" and "proprietor" even in the case of lands has led to great confusion in the determination of occupancy and other rights, as pointed out by Sir Subrahmania Aiyer, J., in the *Cheekati* case, *Cheekati Zemindar* v. *Ranasooru Dhora* (27).

(A.-5). There were some arguments advanced at the Bar on the question whether the words "river," "stream" "channel," and "tank," found in S. 1 (*a*) of the Madras Act VII of 1865 meant (1) the bed, banks and the volume of waters taken together in the river, stream, channel or tank, or (2) whether it meant the bed alone, or the bed and banks alone of the river, stream, channel or tank, or (3) whether it meant only the collection of the waters in the river, stream, channel or tank. I think clause (*b*) of S. 1 of that Act which speaks of water *from* any such river, stream, channel or tank, clearly indicates that the words "river, stream, etc.," are used in the sense of the collective body of waters which are called river, stream, channel, or tank according to the respective configurations of the receptacles. The judgment in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18), also takes the above view.

(A-6). The question whether, in a case where the irrigating waters, though flowing over or standing on *zemindari* or *inam* land, have been assisted in their beneficent work of irrigation by a work "belonging, to or constructed by Government" (See the preamble and S. 1 (*a*) of Act VII of 1865), the Government can impose water-cess does not arise in this case (while it arose, though only very partially, in the Urlam case, as pointed out in the judgment under appeal.) The finding of the District Judge in this case (not disputed before us) is that no such work has been constructed by Government in connection with the Mobagam Channel, or with the branch channel, till it leaves the *inamdars'* limits.

(A-7). Lastly, on the view I take of the facts of this case, it is also unnecessary to decide on the meaning of the word "supplied" in the first proviso to S. 1, clause (*b*), of Act VII of 1865. I might, however, say that I do not agree with the interpretation of that word given in *Venkatappayya* v. *Collector of Kistna* (11) and *Krishnayya* v. *Secretary of State* (12); namely, that the word "supplied," when used in connection with water-supply, implies a previous request by the owner of the land which is supplied with water. As far as water-supply is concerned, rivers, streams, channels and tanks are usually spoken of as supplying fields irrigated under them with water for such irrigation and the idea of a request to the source of supply is inadmissible in such cases. The argument based on the Legislature not having, in the Amendment Act of 1900, changed the word "supplied," judicially interpreted as above in *Venkatappayya* v. *Collector of Kistna* (11) and *Krishnayya* v. *Secretary of State* (12), does not convince me that the Legislature adopted that interpretation, as those cases related to water supplied to *ryotwari* lands and the amendment of 1900 fully established the rights of Government to levy assessment in respect of water even involuntarily supplied to such *ryotwari* lands. One other question may be shortly considered here. Assuming that the beds of streams and rivers, flowing between banks, both of which belong to a *zemindar* or an *inamdar*, are the property of the *zemindar* or *inamdar* and assuming that the waters standing on or flowing over such beds within the limits of the *zemindari* belong to the *zemindar* or the *inamdar* (subject, of course, to the rights of lower riparian *ryot* in natural rivers and streams, and subject to the ownership over those waters ceasing to exist in the proprietor on the waters leaving such limits by evaporation or by flowing away) the question is whether, when one of the banks alone of a stream or river belongs to a *zemindar* or an *inamdar*, he is entitled to half the bed of the river or stream on his side. The rule of English Law no doubt is that such half along the length bounded on that one side by the riparian owner's land belongs to that riparian owner, provided of course the river is not a tidal or navigable river. But is that also the Indian Law in all cases? In the case in *Mukkassa Nair Veettil* v. *Secretary of State for India* (4) I ventured to express an opinion that the Indian Common Law did not recognise this alleged right of the owner of the land in *ryotwari* tracts or in Malabar which are not under the

(27) (1900) 23 Mad. 318.

Permanent Settlement to half the breadth of a highway, or to half the breadth of the bed of a river adjoining such land. I am still inclined to hold that the historical incidents and peculiar feudal tenures connected with English real property law (which was probably further affected by notions derived from the Roman Law) may have had much to do with the establishment of the doctrine that the soil of highways and of the beds of natual water ways belong in equal half-breadths to the owners on both side. I think that the Indian Common Law vested such rights in the village community as a whole within the village limits and in the Sovereign power as representing the community in other places. However, I think it is too late to question the applicability of this English Law so far as the beds of non-tidal and non-navigable rivers and streams *bounded by zemindari and whole inam lands* are concerned as the case-law has established such rights in favour of the *zemindar* and *inamdar*.

Mr. Rangachariar, if I understood him aright, would not admit the right of the Government even to beds of rivers bounded by *ryotwari* lands on both sides. I can only say that I have never in my pretty long experience come across any case in which a *ryotwari* tenant-owner under Government has ever disputed the right of Government to dispose of islands thrown upon the bed of the river bounding his land, or to make reclamations by planting with reads (*nanal*) or otherwise from the bed of the river close to its banks and to grant such reclamations to anybody they like. *Ryotwari* lands stand on an entirely different footing from *zemindari* and *inam* lands, as Government has not lost proprietary rights over *ryotwari* lands. That *ryotwari* land continues " to be Government land," while land in a permanently settled estate is not Government land is further indicated by the definition of " Government land " in the Madras Survey and Boundaries Act, IV of 1897, S. 3 (*ii*), which says that " Government land means any land not forming an estate or any portion thereof," while clause (*i*) defines the word " Estate " as *zemindari*, *jagir*, *mitta*, *palayam*, *inam* village, etc. Thus the Government treats itself as owner of its *ryotwari* tenants' lands while it treats the *zemindar* and *inamdar* as owner of the lands in permanently settled estates. A *jenmi* holding lands in Malabar (where also there is no Permanent Settlement) is placed on the same footing as a person holding under *ryotwari* tenure in clause 2 (1) (*a*) of Act III of 1905. In *ryotwari* tracts river-bed *porambokes* and even small channel *porambokes* (though running through *pattah* lands) are entered as Government property in public Revenue Records. Gradual and imperceptible accretions to *ryotwari* tenants' holdings from adjoining *porambokes* are prevented by placing demarcation stones round *patta* lands. The Government still treats itself as the proprietor of the *ryotwari* lands, whereas in *zemindari* tracts, the *zemindar* is the proprietor, taking the place of Government so far as proprietary rights are concerned, Government having, as admitted in page 300 of the judgment in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) not, reserved to themselves the beds of channels or tank beds or the village sites or other *poramboke* lands within the *zemindari* limits.

As regards river-beds, however, bounded by *zemindari* lands on one side, the *Godavari Lanka* case decided so long ago as in 1858 (see Sudder Adwlat Decisions of 1858, page 188) has established the right of the *zemindar* to the soil of the bed of the river up to half its breadth on his side. Further, in my opinion, the learned Advocate-General's argument *contra* cannot be accepted in this case in view of the admission in the written statement, paragraph 3, which says that the portion of the bed of the Vamsadhara river where the Mobagam Channel takes off is within the limits of the permanently settled estate of Urlam. I might further add that the *zemindar's* right to half the bed of the Vamsadhara river along the length bounded by the Urlam *zemindari* is taken as undisputed by the learned District Judge, Mr. Ayling (now Justice Sir William Ayling, one of the Judges of this Court), and his finding was not attacked in the memorandam of appeal filed in this Court. I might also state that in the written statement, the Government's right to levy assessment for the waters used by the *inamdars* (plaintiffs) for irrigating their lands was based on the specific ground that the irrigating Mobagam Channel and the branch Merakabatte Channel belonged

to and were under the control of the Government. (See paragraphs 3, 4 and 5 of the written statement). The learned District Judge found that these channels did not belong to Government, that the soil of the beds of these channels (at the point where the branch channel leaves the *inam* limits) had been granted to the Urlam *zemindar* about 1803 under the permanent *sanad* fixing his *zemindari* limits and that the channels were never under the control of the Government. This finding of the learned District Judge is accepted by Sir Sankaran Nair, J., and not dissented from by Sir Leslie Miller, J., and, on the evidence, I am clear that that finding is correct. [See also the plan, Exhibit J, prepared by the Revenue Survey Department in 1871, which demarcates half the river-bed including the site of the take off of the Mobagam channel, as belonging to the *zemindari* village.]

Having thus cleared the ground, the only remaining question in this case might, in my opinion, be formulated thus :

"Do the waters flowing in the Vamsadhara river at the length and over that portion of the bed, which bounds the Urlam *zemindari*, and from which bed the Mobagam Channel takes off, belong to Government within the meaning of the expression 'water from river belonging to Government' found in S. 1 of Madras Act VII of 1865?" There can be no doubt that the Government start with a strong presumption in their favour under Madras Act III of 1905, that all standing and flowing waters belong to them, but it is a rebuttable presumption. Though this suit was brought before Madras Act III of 1095 was enacted, and though the Government in their written statement relied upon the ownership of the Mobagam Channel-bed and the control over the waters in that channel as the foundation of their claim to treat the waters flowing into that channel from the Vamsadhara river as their property, I cannot say that they are estopped from claiming proprietorship in those waters under the general presumption in their favour raised by Act III of 1905 passed during the pendency of this suit. The provision of that Act raising such a presumption in favour of the Government cannot, strictly speaking, be said to take away any rights vested in persons who had claims over standing and flowing waters. Rules of evidence enacted by the Legislature come into force at once and must be followed by the Courts in deciding on the rights of parties, whatever may have been the previous state of the law in regard to the proper presumptions and burdens of proof under particular circumstances.

Taking it, then, that the plaintiffs in this case have to prove that the waters of the Vamsadhara river at the particular place where the Mobagam channel takes off do not belong to Government, the question is, has that burden of proof been discharged in this case? If I understand the judgment in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) rightly, the opinion there expressed is that, even though the bed of the river may be vested in the owner of the land situated along the banks so as to give him the right to accretions or *lankas* forming therein (as has been decided in the *Govawari Lanka* case), and though the bed of the river itself may belong to that adjacent owner, still the collection of waters flowing over the bed can never in any sense belong to that owner and can only belong to Government. The judgment says, for instance, at page 303.—

"*The river, it seems to me, belongs to Government even though the bed may be vested in the owners of the land along the banks.*"

It is said further on in the judgment :

"Now clearly the waters of the Vamsadhara river do not belong to any one else but the Government. The owners of the land at the banks of the river do not own the water."

Thus, if I understand the decision aright, all flowing and standing waters, though flowing over beds belonging to others, or standing on tank beds belonging to others, are the property of Government. In this connection, I wish to point out that not only "all standing and flowing waters" wherever situate are and are declared to be the property of Government, but the words just coming after "all flowing and standing waters" in S. 2 (1) of Act III of 1905 are "*all lands wherever situated.*" Thus as regards all lands also wherever situate,

the presumption is created by that section that they belong to Government unless proved to belong to *zemindars*, *inamdars*, etc. As regards standing water in tanks, can it be reasonably argued that the ownership of the tank bed has nothing to do with the ownership of the water standing on it? Can it be said that, even though rain water fills the tank, standing waters are the property of Government though the tank bed may not be the property of Government? It will be seen further that S. 2, clause 1, reserves all right of way and other public rights, all the natural and easement rights, of other landowners and all customary rights legally subsisting. Thus all standing and flowing water is not made the absolute property of Government even, when it is not proved to belong to the *zemindars* or *poligars* or *inamdars* or *ryots*. That is, "plenary" rights are not declared in standing or flowing water in favour of Government. The section again assumes that *zemindars*, *poligars*, *inamdars*, etc., can have the same kind of "property" or ownership in standing and flowing water as Government is declared to possess. The judgment in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) says that it was not contended by the Vakils for the appellants in that case that the water was their property (see page 303). I do not know what precise admissions were made in that case. That flowing water *by its very nature* can never be the absolute property of the Government or anybody else (though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person) is clear to my mind; and when S. 2 (1) says that all standing and flowing waters are hereby declared to be the property of Government (except as may be otherwise provided for be any law for the time being in force subject always to all public rights and natural and easement rights of other land-owners and to all customary rights), it seems to me that the Legislature did not intend to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. It has been held in this Court that the Government cannot divert water even against the customary rights of their own *ryotwari* tenants (though the water flow over beds of rivers belonging to Goverment) without providing other equally effective facilities for irrigation. When water flows in a river over the bed-portion belonging to one owner, that water is temporarily and usufructuarily his property (subject to well-known natural rights of others). As soon as it leaves that portion of the bed and begins to flow over another bed-portion belonging to another owner, the water becomes the property of the owner of that bed-portion, subject again to the same rights. So, as *all land* also are presumably declared to belong to Government, water flowing over *any lands* is presumably the "property" of Government, the "property" in the water following the "property" in the land. I can find nothing in S. 2 of the Madras Act III of 1905 which was intended to give the Government greater rights over water standing or flowing vertically over their land than any other proprietor of land like a *zemindar* or *inamdar* has over water standing or flowing over his. The distribution of water *among their own ryotwari tenants* [see Chief Justice Scotland's judgment in *Ponnusawmi Tevar* v. *Collector of Madura* (24)] is no doubt a right which the Government exercise as soveriegn landlord; but after they had parted with proprietary rights over the beds of particular streams in favour of *zemindars* or *inamdars*, it is impossible, in my opinion, to hold that they retain proprietary rights over water standing in tanks in *zemindaris*, or flowing through *zemindari* lands, or in water flowing in all natural channels, or through artificial channels constructed with the knowledge and permission of Government and owned by the *zemindar* or *inamdar*, or in water percolating into *zemindari* and *inam* tracts and such a claim was clearly negatived in the case of *Ponnusawmi Tevar* v. *Collector of Madura* (24). The Mobagam Channel itself is an artifical channel belonging to the Urlam *zemindar* (the channel at its tail end feeding the Mobagam Tank belonging to that *zemindar*). If *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) has been uniformly followed from which it was decided in September 1910, I ought not, of course, to lightly differ from it. The only case in which it was so followed seems to be the case of *Secretury of State for India* v.

Ambalavana Pandara Sannadhi (25). But, as pointed out in the judgment under appeal, there is a later decision of Benson and Sundara Aiyar, JJ. added to the report of the decision of the Division Bench on the present case reported as *Secretary of State* v. *Kannepalli Janakiramayya* (1), this later decision being found in *Secretary of State* v. *Kannepalli Vencataratnammah* (19) as a footnote case to the present case. The learned Judges, Benson and Sundara Aiyar, JJ., say at page 368 :

"The channel was not one which passed through any Government property before it reached the village of Lakkinidi. It is apparently not a large stream connected with any system of irrigation maintained by Government..,There was no intention on the part of the Government at any time to derogate from the grant made in 1767. Both of the learned District Judges who dealt with case proceeded on the footing that the channel and other *poramboke* in the village belonged to the *inamdar*. On the whole, we see no reason to dissent from that conclusion. *It has, therefore, not been proved that the water irrigating the village belongs to Government.*"

The learned Judges, therefore, clearly held that when flowing water passes over a river or channel-bed which does not belong to Government, the water cannot be said to be the property of Government while it is so flowing over that bed. Of course, it may be said that the learned Judges did not refer to the decision of *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18). The case, however, of *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) could not have been absent from the mind of at least one of the Judges (namely Mr. Justice Sundara Aiyar) who decided the footnote case reported as *Rama Das* v. *Hanumantha Row* (28), for it was Mr. Justice Sundara Aiyar (though he was not a Government Law Officer) whose well-known strenuous and powerful advocacy had been evidently specially secured by the Government for the conduct of the appeals in these Urlam cases in the High Court. If Mr. Justice Sundara Aiyar expresses an opinion as a Judge opposed to the opinion for which he argued at the Bar, such an opinion of his as Judge carries by that fact much more weight, and his non-reference to the decision of *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18) from which he clearly differed in *Secretary of State* v. *Kannapalli Vencataratnammah* (19), is not difficult to understand under those circumstances.

There are two well-known legal maxims which usually come to mind in such cases. One is *aqua currit et debet currere ut currere solebat*, which signifies that water flows and ought to flow as it used to flow. Grounding on this maxim, it is usually stated that there is no property in running water, but merely a right to use it, and this right may only be exercised so as not to interfere with the use of the water by other persons similarly entitled. But the right to use it can itself be called a property in running water, and (as I have said already) it is not wise to confuse ourselves by juggling with the word "property" or the word "owner."

The other maxim is *cujus est solum etc.*, meaning that whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth. This maxim is the basis of the rule that waters in ponds and wells situated on land owned by a person belong to him in a very real sense, and that on the flowing waters also running over his land he has got a real right of property, though of a qualified kind. Section 2 of Madras Act III of 1905, though it talks of property in waters both in the Government and in the *zemindar* or *inamdar*, contains (as I said) several clauses qualifying such right of property. I am reasonably clear that the maxim *aqua currit, etc.*, was not intended to be abrogated in favour of Government. That it was not so intended in the case of a *zemindar* or *inamdar* is not disputed and the language of the section does not to my mind constrain us to hold otherwise in the case of water flowing over even Government lands. On the other hand, how else is a *zemindar* or *inamdar* to prove his "property" in "standing or flowing water" except by proving his "property" in the land situated over or under such water, it being clear from the S. 2 (1) (*a*) itself that such "property" can exist in

(28) (1913) 36 Mad. 564=12 I. C. 449.

him? [See *Narasimha Sastrial* v. *Secretary of State* (6).]

There is, no doubt, a distinction in the extent of the proprietary or ownership rights of a man in water over his soil according as the water is standing water (as in a tank), or water naturally flowing as a river (though the waters cannot be said to belong to anybody else so long as the waters are still vertically over his soil).

But I find it very difficult to hold that there is another distinction between (*a*) the ownership rights of a man in the waters over the soil owned by him, without liability on his part to be taxed by Government for exercising the right of use of such waters springing from such ownership, and (*b*) the ownership of such waters with the right of user springing from such ownership being subject to the liability to be taxed by Government. I am unable to find that any such new distinction between the extents of rights in waters has been created by Act VII of 1865 or Act III of 1905. The former Act refers to a body of waters belonging to Government, and the latter enacts that all waters and lands *prima facie* belong to Government and that other claimants of rights of ownership in any such waters or lands have to prove their rights as against Government. The former Act gives a right to the Government to tax waters belonging to Government and used in the irrigation of the lands of persons *not owning the right in the said waters*. A new intermediate class of ownership in waters, in which the soil proprietor has all the ordinary and natural rights to use the water which is his "property" but with liability to pay assessment to Government (though the Government cannot be said to own the waters as they do not own the soil under the waters), seems to me to be not contemplated by either Act, and no such distinction seems to have been made before *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (18). On the other hand, it was assumed, as a matter of course, in almost all the cases dealing with this question that if the *zemindar* or *inamdar* owns the right to use the waters unlimitedly (excepting, of course, the natural right of lower riparian owner) within his bed without interference from Government, he is entitled to use them free of assessment and he is entitled even to a refund of the assessment collected from him by the Government on the wrongful claim made by the Government that the irrigating waters belong to them. If a man has the ordinary juridical ownership over waters standing on or flowing over his land (the extent of his right being governed by the well-known rules relating to standing waters, flowing waters, upper and lower riparian rights, etc.), he must also be free from assessment by Government for the use of such waters belonging to him, as the Government can have no ownership at all in such waters till they leave his soil. A new ownership in waters in the Government entitling them to imposé assessment for the use thereof, though they have no ownership therein according to ordinary juristic principles, is again difficult for me to grasp and I am not satisfied that any such new kind of ownership was created by either of the two Acts.

I am aware that by the amendment of 1900 to Madras Act VII of 1865 it has been enacted that when water from a river *belonging to Government* by direct or indirect flow or percolation or drainage irrigates any land under cultivation, the Government is entitled to levy a separate cess for such water. In the case of rivers running over Government *poramboke*, the water is the property of Government and if it irrigates a *ryotwari* tenant's land by percolation, it continues even after entering the tenant's holding, as I said, to be Government water, as the tenant's land also belongs in proprietary right to Government and is called Government land in the Survey and Boundaries Act. These considerations do not apply to water flowing over or percolating into *zemindari* or *inam* lands and no cess, can, therefore, be levied under Act VII of 1865 for use of that water, excepting probably in case of the water having been made available for beneficial irrigation through works belonging to or constructed by Government.

In the result, I would dismiss this Letters Patent Appeal with costs.

Bakewell, J.—The principal question in this appeal is whether the Vamsadhara river, at the place where the Mobagam Channel takes off water which flows to and irrigates the plaintiffs' land, is a river or stream belonging to Government

within the meaning of Madras Act VII of 1865.

A river cannot be the exclusive property of any person unless it flows throughout its whole course within his land, since, if another person has a right of access to it, he obtains certain rights of appropriating water from the stream and of preventing other persons from interfering with his rights, even though he has no right of ownership over the land whereon the river flows. [See *Lyon* v. *Fishmongers' Company* (29).] It cannot have been the intention of the Legislature to deal only with exceptional cases of this kind, and I think that this Act may be construed as applying to such cases of limited property as arise from ownership of the river-bed. I think that the English authorities show that the owner of the river-bed has a qualified ownership in the stream of water which flows over it, by virtue of which the river and stream may be said to belong to him.

It is admitted on behalf of the respondents that at the beginning of last century the British Governmet were the owners of the river-bed and of the Urlam *zemindari* which abuts thereon, and through which the Mobagam Channel conveys water to the plaintiffs' land. It is also admitted by both parties that at about that time the Government issued a *sanad* of this *zemindari* in common form, and it is argued on behalf of the plaintiffs that this *sanad* constitutes a grant of the full ownership of the land comprised in the *zemindari*, subject to the rights of tenants, and that this grant must be construed in the same manner as a grant of land under English Law and accordingly includes either the whole of the river-bed and the bank adjacent to the *zemindari*, or at least the river-bed *ad mediam filum aquae*. The common form of *sanad* under the Permanent Settlement is not in form a grant of property : it contains no parcels, no dimensions, no boundaries or abuttals, and does not follow any precedent known to a British lawyer, but it is to a great extent a literal copy of the preamble and provisions of Regulation XXV of 1802 and differs from it principally in specifying the amount of the assessment to be paid by the *zemindar*. Paragraph 13 states that "The foregoing conditions contain an abstract of the obligations and duties which you shall incur and of the rights which you have acquired under the new constitution erected for the security, protection and prosperity of the subjects of the British Government ;" and the *sanad* concludes, after an exhortation to good conduct, with a declaration that the grantee is "Hereby authorised and empowered to hold in perpetuity to your heirs, successors and assigns at the permanent assessment herein named, the *zemindari* of.....

.....

The *sanad* also contains a direction to the grantee to keep accounts, and for that purpose to maintain the village *karnams* or accountants, and to enter into agreements with the *ryots*. Both the *sanad* and the Regulation already mentioned contain the expressions "a permanent property in their land for all time to come," and "the proprietary right of the soil," but the words "proprietors of land" and "proprietary possession" have a technical signification in the Regulations, and "proprietary possession" has been explained by their Lordships of the Privy Council to mean "the possession and rights of a proprietor in the technical sense in which that word is used, *viz.*, the person who pays the rent immediately to Government" [*Oolagappa Chetty* v. *Arbuthnot* (30).]

In Regulation IV of 1822 the Government found it necessary to declare that the provisions of previous Regulations, including XXV of 1802, were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and that tenants' rights should be determined by the Courts. I think that these Regulations and the form of *sanad* show that it was not intended to create any rights of property or to make a grant of a particular estate in land, but rather to invest a certain person with the position or status of *zemindar* of a particular *zemindari*, to make that position permanent, transferable and inheritable, and to fix the land tax or share of produce payable by the *zemindar* or his assigns to the Government. Upon this construction the rights of the *zemindar* are such as were appurtenant to the *zemindari* at the date of the *sanad* and, I think, that the burden is upon him to

(29) (1876) 1 A. C. 662

(30) (1875) 14 B.L.R. 115 ; 1 I. A. 268.

show that his rights extended beyond the natural boundaries of the *zemindari*. Doubtless the *zemindar* and his *ryots* would continue to exercise all rights, naturally and openly enjoyed by them at the date of the grant; thus not only would the riparian villages be entitled to take water from the river, but the cultivators on an artificial channel in existence at that date, such as the Mobagam Channel, would also be entitled to take as much water therefrom as would pass thereby and as the terms of their holding allowed. Any other construction would be contrary to the intention of the Government, that the lands within the *zemindari* should be profitably cultivated and that the *zemindar* should obtain his proper share of the produce and be able to pay his assessment to the Government, and would be in derogation from the grant.

The riparian villagers may have made some use of the river-bed and banks, but there is no evidence that any proprietary rights over them or the stream of water were exercised by these villagers or the *zemindars* at the date of the *sanad*, and in my opinion the burden is upon those who assert that any such rights passed under the *sanad* to prove that they were appurtenant to the *zemindari* and enjoyed therewith.

It is, I think, obvious that decisions relating to the construction of English conveyances of land, which assume conditions and presumptions different from those prevailing in India, are wholly inapplicable to a *sanad* under the Permanent Settlement. Even if those decisions apply, the *sanad* can only be construed as granting the river-bed *usque ad medium filum aquae* and the stream of water flowing thereon; and since the other moiety of the river has not been shown to have been transferred by Government it must be taken to be a river or stream of water belonging to Government.

In the natural course of things part of the latter stream must cross the moiety of the river-bed assumed to belong to the *zemindar* and flow down to the Mobagam Channel, and part of the water which reaches the respondents' land comes by direct or indirect flow from a river or stream belonging to Government from or through adjoining land, and is, therefore, chargeable [Act VII of 1865, S. 1 (*b*)].

The learned Judge from whose judgment this appeal is brought based his decision upon the ground that the *sanad* was a grant of all rights vested in the Sovereign in respect of the *zemindari* and its appurtenances, except such as were expressly reserved thereby. Regulation XXV of 1802 and the common form of *sanad* issued thereunder no doubt recognise that the *zemindars* had formerly exercised certain sovereign rights over the territories under their control, and I think they show the intention of British Government to curtail those rights. Even assuming that the *zemindars* as petty chieftains exercised some form of sovereignty, it has not been shown that it assumed the form known in the West. As Sir H. S Maine has pointed out, the idea of the Sovereign as proprietor was derived by the European jurists from Roman Law (see Ancient Law, 10th Edition, page 104 *et seq*; International Law, page 55); and the idea of sovereignty in India, more especially among such subordinate rulers as the *zemindars*, was most probably that of a tax-gathering Empire.

The *ryots* grouped in villages were the possessors and cultivators of the soil under immemorial custom, and the right of the *zemindar* was probably to extract as much of the produce of the soil as he could from them and from the tenants whom he planted upon the cultivable waste. Paragraph 13 of the *sanad*, which reserves full legislative powers to the British Government, introduces the European idea of "eminent domain" over the property of the members of the community, under which the Sovereign claims the power of disposing of everything contained within its territory for the general good, and seems to me to negative any intention to transfer "sovereign rights." (See Hall, International Law, 6th Edition, page 45). There is no evidence that the *zemindar* in this particular case ever exercised any proprietary rights over the Vamsadhara river, or that as ruler he considered himself to possess such rights, and the *sanad* itself contains no provision whatever with reference thereto.

I am of opinion that the plaintiffs have failed to prove that the Vamsadhara river is part of the Urlam *zemindari*, and that from their own admission as to the

property in the river at the date of the *sanad* as well as from the general presumption as to the rights appurtenant to the *zemindari*, and the special presumption now raised by Madras Act III of 1905, the river must be held to belong to Government, subject to the ordinary riparian rights and to the special right of taking water through the Mobagam Channel arising from its existence at the date of the *sanad*. I agree with Oldfield, J., that the general terms of Act VII of 1865 are not limited by the preamble. The plaintiff's land is irrigated by water from a Government river, and I think that the burden is upon them to prove an "engagement" which entitles them to irrigation free of charge [Madras Act VII of 1865, S. 1 (*b*)]. Such an engagement appears in the common form issued upon the *Inam* Settlement, which states the number of wet and dry acres claimed by the *inamdar*. It appears from the plaint that the original grant under which plaintiffs hold specified the number of wet and dry acres, and that since the Settlement six acres of the dry lands have been converted into wet, but it is not averred by what right or at what date this conversion was effected. It appears to me that the object of specifying in the original grant and at the *Inam* Settlement the number of wet acres was to declare the extent of the grantee's rights of irrigation; that is, he was to be allowed to take only sufficient water to irrigate the number of acres described as wet.

The claim to irrigate for a second crop is in effect a claim to take water for double the number of acres specified in his grant, and I think that in order to substantiate the claim he should aver and prove his title.

I agree with the order proposed by my learned brother Oldfield, J.

By the Court.—The result is that the appeal succeeds and the plaintiffs' suit is dismissed with costs throughout.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 208

SADASIVA AIYAR AND NAPIER, JJ.

Chockalingam Chetty—Plaintiff—Appellant.

v.

Periya Karuppan Chetty and *others*—Defendants—Respondents.

Second Appeals Nos. 937 to 949 and 951 to 957 of 1912, decided on 29th October 1914, from the decrees of Dist. Judge, Ramnad, in Appeal Suit Nos. 1 to 13 and 15 to 21 of 1911.

Contract Act (9 of 1872), S. 45—Payment of *entire rent* to one co-sharer if *bona fide* is valid, if otherwise, other co-sharer can sue for his share without making others party.

Where a tenant pays off the *entire rent* due from him to one of two co-sharers, he can escape liability to the other, if he shows that his payment to that co-sharer was one made *bona fide*. [P. 208, C. 2 & P. 209, C. 1.]

But if the payment by him was not made in good faith and was made to defeat the claim of the other co-sharer to his share of the rent, the latter's right to recover his share of rent is not affected. [P. 209, C. 1.]

A co-sharer who has been paid his share of the rent is not a necessary party to the suit by the other for his share. 35 Mad. 685 and 33 All. 308, Foll. [P. 209, C. 1.]

C. S. Venkatachariar and *A. Srinivasa Aiyangar*—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—We must accept the finding of the District Judge that Karuppan Chetti was a joint landholder with the plaintiff in the plaint lands. We are not concerned with the plaintiff's right to sue for the whole rent (including Karuppan Chetti's share) in case no portion of the rent had been paid up, but with quite a different question, whether plaintiff can sue for the whole or even his half share of the rent if the tenants had paid up the whole rent to the plaintiff's co-sharer, as is found in this case. The decision of that point depends on the answer to two questions: (*a*) whether the payment of the whole rent to the plaintiff's co-sharer was *bona fide* [See *Sheik Ibrahim Taragan* v. *Rama Aiyar* (1)], and (*b*) whether a tenant is or is not entitled to pay to a co-sharer of the landlord's rights the latter's share of the rent simply because the said

(1) (1912) 35 Mad. 685; 10 I.C. 874.

co-sharer's name does not appear in the title-deeds under which the transfer of the *melvaram* right was effected in the plaintiff's name.

We agree with the Deputy Collector that the payment of the whole rent to Karuppan Chetty was not made in good faith and that the payment was made to defeat the plaintiff's claim to his half share of the rent. In such a case the plaintiff's right to recover his share cannot be affected. [See *Zia-ud-din* v. *Muhammad Umar* (2)].

As regards the other question, if Karuppan Chetty is legally entitled to one-half share in the rent, we do not see how the non-mention of his name in the title-deed could prevent the tenant (if the latter chooes) to pay half of the rent to Karuppan Chetty, or what the fact (that the tenant was not bound to pay any portion of the rent unless both the plaintiff and Karuppan Chetty institute a suit to recover) has to do with the tenant's right to pay the half share to Karuppan Chetty. The defendants having paid to Karuppan Chetty his share of the rent, there is no object in making Karuppan Chetty a party to this suit if the decree is to be passed only for the plaintiff's share of the rent. The defendants' plea of non-joinder has really no force unless "the rights and interests of the parties actually before" the Court (see the words of O. 1, R. 9, of the Code of Civil Procedure) cannot be decided without the joinder of Karuppan Chetty.

In the result the appeal of the plaintiff (who has obtained a decree for his half share of the rent and who appeals in respect of the other half) and the memorandum of objections of the defendant in Second Appeal No. 941 of 1914 denying the plaintiff's right to a half-share of the rent decreed to the plaintiff are both dismissed with costs. Second Appeals Nos. 938 to 949 and 991 to 957 of 1912 and the memorandum of objections in Second Appeal No. 951 of 1914 being withdrawn are dismissed with costs.

S. N./R. K.

Appeals dismissed.

(2) (1911) 33 All. 308 ; 9 I.C. 275.

A. I. R. 1916 Madras 209 (1)

WALLIS, C. J. AND HANNAY, J.

In re *Mannar Chetti* and *others*—Petitioners.

Civil Revn. Petn. No. 408 of 1913, decided on 21st January 1915, against the proceedings of Sub-Judge, Kumbakonam, dated 18th April 1913 in O. S. No. 3 of 1911.

Criminal P. C. (5 of 1898), Ss. 439 and 476—Civil Court's order under S. 476 cannot be interfered by High Court under S. 439.

The High Court has no power under S. 439 of the Criminal Procedure Code to interfere in revision with an order made by a Civil Court under S. 476, Criminal Procedure Code.

[P. 209, C. 2.]

T. S. Ramaswami Aiyar—for Petitioners.

S. T. Srinivasa Gopalachariar, K. Srinivasa Aiyangar, C. V. Ananthakrishna Aiyar, K. Ramachandra Aiyar and *S. Muthiah Mudaliar* as *Amicus Curiæ*.

Order.—Following the decision of Bashyam Aiyangar, J., in In re *Chennanagoud* (1) and of the Full Benches of the Allahabad and Calcutta High Courts, In the matter of *the petition of Bhup Kunwar* (2) and in *Har Prasad Das* v. *Emperor* (3), we think it may now be taken as settled that we have no power under S. 439 of the Criminal Procedure Code to interfere with an order made by a Civil Court under S. 476 of the Criminal Procedure Code. There is no case for interference under S. 115 of the Civil Procedure Code. The petition is dismissed.

S.N./R.K.

Petition dismissed.

(1) (1903) 26 Mad. 139.
(2) (1904) 26 All. 249.
(3) (1913) 40 Cal. 477=19 I. C. 197.

A. I. R. 1916 Madras 209 (2)

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Secretary of State—Plaintiff—Appellant.

v.

Subraya Karantha—Defendant—Respondent.

First Appeal Nos. 220 and 274 of 1913, decided on 14th October 1915, from the decrees of Sub-Judge, South Canara, in Original Suit No. 61 of 1911.

(a) Evidence Act (1 of 1872), S. 102—In case of escheat Government must prove *prima facie*

absence of any heir to deceased—On *prima facie* proof burden is shifted to other side—Crown, escheat.

Per *Wallis, C. J.*—In a suit by the Government for ejectment of the defendant on the ground of escheat. It lies upon the Crown to prove at least *prima facie* that the deceased died without heirs, and it cannot rely upon the want of title of the party in possession. 1 B. L. R. 44=12 M. I. A. 448 (P. C.), Foll. [P. 210, C. 2 & P. 211, C. 1.]

When once the Crown establishes *prima facie* that the deceased died without heirs, the burden is shifted on to the party in possession to show that he is in the line of heirs. 2 W. R. 59=8 M. I. A. 500; 1 B. L. R. 44=12 M. I. A. 448 (P. C.), Foll. [P. 214, C. 1.]

(b) Evidence Act (1 of 1872), S. 13—Failure to prove relationship in another suit is evidence against existence of relationship and is relevant under S. 13.

The fact that in another contested suit a party has failed to prove the relationship of his line with the deceased is evidence against the existence of the right of that line as heirs of the deceased and is relevant under S. 13. 30 Mad. 510; 3 Bom. 143; Foll. [P. 212, C. 1.]

(c) Landlord and Tenant—Ejectment—Lease need not be set aside.

Where a lessee is in possession, the plaintiff to succeed in a suit in ejectment need not sue to set aside the lease. 25 Cal. 1; 33 Cal. 257; 34 Cal. 329; (P. C.) Foll. [P. 212, C. 2.]

(d) Hindu Law—Succession—Common *Gotra* and not common family name determines relationship.

Per *Seshagiri Aiyar, J.*—It is the common *gotra* that determines relationship between the parties, and not the use of common family name. [P. 213, C. 2.]

Government Pleader—for the Government.

C. V. Ananthakrishna Aiyar—for Respondent.

Wallis, C. J.—This is a suit brought by the plaintiff to declare that the properties in South Canara of the late Zalle Subraya, who appears from Exhibit N to have died in that district in the year *Parthiva*, 1825—26, escheated to the Crown for want of heirs on the death of his widow Manjamma, who appears to have died at an advanced age in January 1906 at Benares. The suit was brought against the defendant in possession, and the latter in his written statement set up the existence, among other alleged heirs, of the junior widow and the senior widow's daughter and daughter's son of one Venkatapathaya, who are described as residing at Shimoga in the Mysore State. The Subordinate Judge has rejected the case set up as to the other alleged heirs but has held that the descendants of Venkatapathaya are in the line of heirs of the deceased. Before dealing with the facts of this somewhat extraordinary case, it will be well to refer to what their Lordships have laid down in *Gridhari Lall* v. *Bengal Government* (1), the leading Indian case, as to *onus* which lies on the Crown in claims to escheat. In the course of the argument in that case Kelly, C. B., observed that in England in a writ of Intrusion or Ejectment, the Crown must, to take lands by escheat, prove there was an entire failure of heirs, and so also of a Lord of the Manor with respect to copyholds on the death of a tenant without heirs, and cannot rely upon the want of title of the party in possession.

In that case the Calcutta High Court had rejected the claim of the appellant Gridhari Lall, who had been in possession and recognized by Government as heir, but had decided that the decree against him should not be made absolute until the claims of other alleged heirs had been investigated, and had remanded the case with a direction to the District Judge to call upon these and any other claimants to come in and prove their case. Their Lordships, whilst disposing of the appeal on the ground that Gridhari Lall was an heir, deemed it right to take exception to the procedure adopted by the High Court and to point out that, as against a defendant in possession, the Crown was in the position of an ordinary plaintiff in an ordinary suit in the nature of an ejectment. Their Lordships went on to lay down that it lay upon the Crown to prove at least *prima facie* that the deceased left no heirs, and that the defendant was entitled to set up any *jus tertii* that might exist. The course taken by the High Court, in their Lordships' opinion, would have had the effect of causing the other claimants who had intervened as objectors to litigate their title with Government, casting apparently the burden of proof on them, and seemed to their Lordships to deprive the appellant of his right to defend his possession on the ground of an existing *jus tertii*. It had been objected for the Crown that it could not be called upon to prove a negative, and it was apparently with reference to that objection that their Lordships guarded themselves by saying that it lay upon

(1) (1868) 1 B. L. R. 44=12 M. I. A. 448.

the Crown to prove at least *prima facie* that the deceased died without heirs.

Coming now to the facts of the present case, the deceased Zalle Subraya died in the year 1826 leaving a widow Manjamma and apparently no other near relations. Manjamma died at Benares in January 1906, having survived her husband for 80 years and having about 50 years before her death alienated her husband's properties in South Canara and removed herself to Benares where she died. No pedigree or family tree showing the alleged relationship has been produced from proper custody, and the defendant is obliged to rely on the pedigrees or statements of relationships which are to be found in the pleadings in the litigation already mentioned. As the alleged common ancestor Venkappia is fourth in ascent from the deceased who died in 1826, direct oral evidence is not to be looked for. Nor again is there any oral evidence worth considering that either Subraya or his widow ever recognized the alleged relationship. On the other hand there are denials, no doubt, of an interested character by Manjamma in the litigation already referred to. In view of this litigation and of the conduct of Manjamma in alienating her properties and removing to Benares, it is not perhaps surprising that no communication should have passed between her and Venkatapathiya's family after her removal to Benares, but the result is that there is no evidence of recognition any more than there is any direct evidence of relationship in support of the defendant's case. We are in effect left to rely on evidence of assertion of title as reversioners by Venkatapathy's line in certain suits filed between 1847 and 1872, in one of which the alleged relationship was found not to be proved. The Subordinate Judge lays much stress upon the improbability that Venkatapathy's family would have persisted so long in their claims if they had been concocted, but I cannot attach much weight to this argument, and I do not think the evidence of assertion is such as would justify us in holding the alleged relationship proved in view of the fact that every assertion appears to have been met with a denial by Manjamma, and that in the only case where the issue was tried there was a finding against it.

Exhibit N is the judgment in Original Suit No. 280 of 1847 in the Court of the Sudder Amin of Honnavar, an unsuccessful suit brought against Manjamma and others by the widow of one Jalle Gundappa, who was alleged to be the undivided brother of the deceased. Paragraph 11 shows that Venkatapathiya's grandfather Zalle Venkatapathiya had presented a petition stating that he was the undivided *dayadi* of the deceased and that his claim should not be prejudiced by the suit. The petition was recorded with the observation that if his allegation was true he might bring a separate suit.

This judgment was pronounced on 8th March 1852, and it was only some years later that Venkatapathiya's father Timmarasayya brought two suits, Original Suit No. 731 of 1862 and Original Suit No. 15 of 1864, in the Court of the *Taluq* Munsif of Kundapur. The plaintiff sued to recover the properties of the deceased as his undivided *dayadi* from the widow and her alienees, and in her written statement she denied that he was a member of her family and alleged that he had no right whatever in the property. In Exhibit M which is a translation of the judgment from the Canarese, the Munsif observed in paragraph 11 : " the first question to be considered is whether the plaintiff and the first defendant are members of the same family, and whether either the plaintiff or his ancestors have either enjoyed the suit property or obtained the benefit thereof. In respect of this he has examined four witnesses in Kavelidurga *Taluq* (in Mysore, then under a Chief Commissioner) and four witnesses in this Court. Of these only two have given some particulars of the family, but they did not explain satisfactorily how they came to know them. From the evidence of the remaining witnesses nothing has been proved. It appears that the first defendant is a lonely woman without any relations whatever and having property, has been enjoying the same absolutely from the beginning of the year – (illegible). It appears from the general statement of the witnesses that the 1st defendant brought and had (*sic*) the plaintiff in her house and got writing and other work done by him, that thereafter, as ill-feeling arose between them, she turned outthe plaintiff ; that formerly he used to come in this manner from the *ghauts* occasionally from time to time staying for

some days and go away. As these facts alone are not sufficient for establishing any rights—." Some word is missing after this, but it cannot affect the sense, and this judgment seems to me to contain a finding as between the plaintiff in that suit, Venkatapathiya's father, and the widow Manjamma, that the plaintiff had failed to prove his relationship with the deceased. The fact that Venkatapathiya's father failed in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of proof than it is now is, in my opinion, evidence against the existence of the right of that line to claim as heir of the deceased within the meaning of S. 13 of the Evidence Act. This seems to be in accordance with the ruling of this Court in *Natesa Gramani* v. *Venkatarama Reddi* (2), to which I was a party, and on re-perusal of the judgment of Beaman, J., in *Mohamad Amin* v. *Hasan* (3) which was cited on the other side and impressed me at the time, I think that this case, where the alleged relationship admitted of assertion, denial and recognition in a series of transactions extending over a long series of years, comes precisely within the class of cases to which Beaman, J., held the section specially applicable at page 153 of his judgment. If relevant, this evidence is, in my opinion, of great importance as it practically stands uncontradicted, seeing that the Subordinate Judge has rightly, in my opinion, disbelieved all the oral evidence for the defence in any way connecting Venkatapathiya's line with the deceased and we agree with him in this. The effect of this evidence is, moreover, strengthened by the subsequent conduct of the parties. Timmarasaya, the plaintiff in these suits of 1862 and 1864, did not venture to file another suit, but his son Venkatapathiya filed Original Suit No. 24 of 1871 in the Court of the Principal Sudder Amin of Mangalore, making his father Timmarasaya a defendant, for a declaration that the alienations made by Manjamma were not binding on the reversioners. This suit was dismissed by the first Court and by the High Court in Second Appeal No. 657 of 1872 on the view which then prevailed that only the next reversioner could sue, but neither Timmarasaya nor Venkatapathiya after his death ever instituted any other suit, and the evidence of his daughter Thimmava shows that she and her family never put in any claim until they were asked to sign a claim at the instance of the defendant, after the Collector had issued a notice calling for claim. The Subordinate Judge has really nothing to go upon but the fact that the relationship has been asserted in three successive suits, and this, though it was not proved in the only case in which it was investigated, and the further fact of slight import that both the deceased and the petitioner in the suit of 1847 bore the first name of Zalle. The hesitation shown by Government as to whether they should file this suit or wait for certain deaths which would obviate the necessity of raising this issue proves nothing in support of the defendant's case. Without the evidence of the failure of Venkatapathiya's father to establish the relationship in 1864, there might have been more difficulty in saying that the plaintiff has established the *prima facie* case which he is required by law to make out, but that transaction should, in my opinion, be regarded as more than shifting the onus, and as I have already pointed, the same inference is suggested by the subsequent conduct of the parties. I would allow the appeal, reverse the decision and give judgment for the plaintiff. On the 5th issue we agree with the finding of the Subordinate Judge that the lease is not binding on the plaintiff, and we cannot accept his view that the plaintiff is not entitled to recover this property in the present suit without suing to set it aside. See *Modhu Sudan Singh* v. *Rooke* (4), *Harihar Ojha* v. *Dasarathi Misra* (5) and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (6). There is no ground of appeal as to the defendant's right to improvements, and we are not prepared to allow the point to be raised. We accept the finding of the Subordinate Judge who accepted the finding in paragraph 13 of the 2nd Commissioner's report. We think the Subordinate Judge was wrong in disallowing the plaintiff's right to mesne profits. The amount will be determined by the lower

(2) (1907) 30 Mad. 510.
(3) (1907) 31 Bom. 143.
(4) (1898) 25 Cal. 1 ; 24 I. A. 164 (P.C.).
(5) (1906) 33 Cal. 257.
(6) (1907) 34 Cal. 329=34 I. A. 87 (P.C.).

Court and embodied in the final decree, the mesne profits to run from 23rd September 1909, when the defendant was served with notice calling on him to surrender possession. By consent, we also direct the Court to ascertain what changes, if any, must be made in the figures given in paragraph 13 of the 2nd Commissioner's report, having regard to the suggestion that the defendant who has continued in possession, may have cut and carried away the trees valued by the Commissioner or exhausted the improvements for which an allowance was made, any such alteration to be embodied in the final decree. The plaintiff is also entitled to future mesne profits from date of suit to delivery of possession. The appeal is allowed and each party will bear his own costs of this appeal and there will be proportionate costs after mesne profits have been ascertained.

The appeal No. 274 of 1913 is dismissed with costs.

Seshagiri Aiyar, J.—I agree and wish to say a few words on the general features of the case. If the persons in whose favour a *jus tertii* is set up by the defendant sued to recover the plaint properties, I would have had no hesitation in holding that they have failed to establish their claim. The person put forward as the sister's son of Zalle Subraya, the last male owner, has absolutely failed to prove his relationship. I cannot believe that if he was related to Manjamma as he states, he would never have had any correspondence with her, would not have visited her in Benares and would not have adduced evidence of the observance of pollution on her death. Neither he, as the alleged nephew of Gundappa, took any objection to the sale of all her property by Manjamma when she left for Benares—no suit was brought subsequently to contest the alienation. Equally unsatisfactory is the evidence regarding the claim of defence witness No. 1. He is unable to prove that he observed pollution when Gundapp's widow Kavaramma died. The Subordinate Judge was not impressed with this evidence and I do not differ from him.

The case of Thimmavva is more difficult. Naturally enough, great stress was laid by the learned Vakils for the respondant on the use of the family name Zalle. The evidence regarding this is very meagre. My lord has dealt with it and I do not propose to examine it any further. It is noteworthy that in the genealogical trees filed from 1847 onwards, the word Zalle does not appear. There is a singular lack of testimony regarding the identity of Gotram between that of the claimant's father and that of the last male owner. This is very suspicious. In Mitakshara, Chapter XI, S. 5, placitum 6, the concluding clause runs thus:—"The relationship of *samanodakas* extends to the fourteenth degree; or as some affirm, it reaches as far as the memory of birth and name extends. *This is signified by gotra* or the relation of family name." The family name is generally taken from the place in which the common ancestor originally lived. It is possible that this common family name may be the heritage of more than one group of persons. These may not be related to each other at all; but if the family name is associated with the common *gotra* (which is by repute the name of the *Rishi* of pre-historic days from whom descent is traced), then there will be something tangible to go by. I repeatedly asked the learned Vakils whether there was any evidence of the common *gotram*. The absence of this evidence is very significant. I, therefore, do not attach weight to the use of the name Zalle by the claimant's father and grandfather. Barring that, we have only the assertions of right on three occasions and the filing of genealogical trees. On each of the occasions, the course pointed out by the Court which would have brought matters to a head was not followed. Venkatappayya asserted the extravagant claim of being undivided in the suit of 1847 (between Kavaramma and Manjamma). He was referred to a regular suit. Nothing was done till nearly 15 years after. Timmarasaya, the son of Venkappia, asserted that he was an undivided cousin of the husband of Manjamma in a suit of 1862 and in Original Suit No. 415 of 1864. These suits were dismissed. At this time Manjamma had granted an *arthamulgeni* lease to the defendant's vendor's predecessor; if the claim of being a joint member of the undivided family was found unsustainable, it is difficult to understand why the claim as reversioner or a declaration that the alienation was not binding beyond the widow's life-time, was not subsequently

litigated. At the time of the third litigation, the unsuccessful plaintiff of 1864 was alive. His son sued now. He was nonsuited on the ground that his father was alive. Yet, the father did not sue. Nor did the son, subsequent to the death of the father, pursue his remedies. These are very suspicious circumstances. I am, therefore, unable to attach weight to the three assertions of right referred to by the Subordinate Judge.

It was argued by Mr. Ananthakrishna Aiyar that the burden of proof lies on the Secretary of State. He relied on *Gridhari Lall* v. *Bengal Government* (1). In that case, the defendant in possession was an undoubted relation of the last male-holder. He was the father's maternal uncle of the deceased. The question was whether he was an heir under the Benares School of Law. The Judicial Committee held that he was. Their Lordships further pointed out that " the appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the respondent's suit ; and the title of those persons who, he says, are, failing himself, the heirs of Woopendro Chunder Roy, *has never yet been determined.*" Where a specific individual is put forward in the written statement as an heir and the right of that individual was not *determined*, the Government could not say that the property has escheated. I do not understand the above passage to lay down, before there can be an escheat, that the Government should affirmatively establish the invalidity of the claim of the third party whose title was pleaded by the defendant. Their Lordships intimate in the earlier portion of the judgment that the Government should prove *prima facie* that the last male owner died without heirs. This has been done in this case. Nobody claiming heirship to Subaraya is in possession. No persons who, in common parlance, could be said to be relations, have been found to have had any correspondence with the woman who left for Benares 50 years ago. This is all the *prima facie* proof that can be expected. The burden then would be shifted to each of the claimants to establish *prima facie* his relationship to the last male-holder. If that is not satisfactorily done, the Government must succeed. The decision of *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (7) supports this view. I, therefore, agree with the learned Chief Justice that the appeal should be allowed and in the further order which he proposes to make.

S. N./R. K.

Appeal allowed : Suit decreed.

(7) (1865) 2 W. R. 59=8 M. I. A. 500 (P. C.)

A. I. R. 1916 Madras 214

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

K. S. Rm. Ramanathan Chetty and *others*—Plaintiffs—Appellants.

v.

T. K. V. Ramasami Chetty and *others*—Defendants—Respondents.

First Appeal No. 20 of 1913, decided on 4th November 1915, against the decree of Sub-Judge, Ramand, in Original Suit No. 94 of 1911.

(a) Transfer of Property Act (4 of 1882), Ss. 54 and 118—Unregistered deed of exchange of plots—Plaintiff acquiescing in defendant's construction of a wall estopps him from claiming the site—Plaintiff will be equitably prevented from disturbing defendant's possession—The rule that equity does not interfere in legal title does not apply where possession is acquiesced in though without a registered deed.

Per *Seshagiri Aiyar, J.*—Acquiescence will not supplement an incohate title—valid title can be passed only under the provisions of Ss. 54 and 118.

Where the plaintiff and the defendant agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house sites, the agreement being reduced to writing though not registered, and the defendant having erected a wall on the land allotted to him, the plaintiff sued to recover the land :

Held, per *Chief Justice*, (*Seshagiri Aiyar, J.*, dissenting), (1) that the plaintiff, having acquiesced in the defendant's building the wall and having obtained a payment therefor, was estopped from claiming the land and could not recover it even though the original deed of exchange was unregistered and did not pass any title to the defendant; [P. 216, C. 1.]

(2) that if a man builds a house partly on his neighbour's lands and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it;

[P. 216, C. 2.]

Mac Manus v. *Cooke*, 35 Ch. D. 681, Foll.

(3) that the rule of law laid down in 29 Mad. 336 that where there is no legal title equity will not interfere to supplement it, does not involve the proposition that where there is no registered document no amount of acquiescence on the part of the transferor will bar his

right to get back the property within the statutory period. [P. 216, C. 1.]

Per *Seshagiri Aiyar, J.*—(1) Where a Statute enjoins that title would pass only if certain formalities are complied with, conduct and action cannot be relied upon to supplement an inchoate title. [P. 217, C. 2.]

(2) The use of the word "only" in Ss. 54 and 118 of the Transfer of Property Act excludes the possibility of title being acquired by any other process than that laid down in these sections. [P. 217, C. 2.]

(b) Evidence Act (8 of 1872), S. 115—(Per Seshagiri Aiyar, J.)—Rule of estoppel does not prevail against statutory right.

(3) The rule of estoppel is one of evidence and ought not to be allowed to prevail against a statutory right. [P. 218, C. 1.]

S. Srinivasa Aiyangar and *K. Rajah Aiyar*—for Appellants.

A. Krishnaswami Aiyar—for Respondents.

Facts.—Two Nattukottai Chetties in Ramnad District exchanged portions of the backyards attached to their respective houses for their mutual convenience by an unregistered instrument. One of them subsequently built a house on the site so got in exchange. After the completion of the building, the other Chetty instituted a suit to recover the site he had conveyed, on the ground that no title passed to the defendant as the document which was an exchange deed was not registered and that, therefore, he was entitled to recover the property. The defendant pleaded that the document was not a deed of exchange but an award and that the plaintiff was estopped by his conduct from seeking to eject him after he had built substantially upon the site.

The Subordinate Judge of Ramnad held that the document was an award and without deciding the question of estoppel, dismissed the suit, on the ground that as an award, it did not require registration. Hence this first appeal to the High Court by the plaintiffs.

Wallis, C. J.—In this case, the parties by an unregistered agreement, Exhibit B, dated 4th March 1908, agreed for mutual convenience to an exchange of certain plots of land, forming part of their adjoining house sites. Exhibit B shows that the agreement was come to in the presence of mediators, and the effect of the oral evidence is that it was these mediators who settled the amount of the cash payment to be made by the 1st defendant to the 1st plaintiff to equalize matters, but Exhibit B is in terms an agreement signed by the parties and we see no sufficient reason for treating it, as the Subordinate Judge has done, as an award or proceeding and as such, it is exempt from the provisions of the Registration Act. It is, therefore, necessary to deal with the plaintiff's claim, that owing to this want of registration, he is entitled to recover back the land given by him in exchange to the defendant, even though the defendant has erected on the land one of the walls of his new house which has cost over Rs. 40,000 and the removal of the wall would bring down the house, and although nearly a year after the exchange, when the defendant was beginning to build, the plaintiff objected to the extent of the land awarded to him in exchange and obtained a further payment of Rs. 525 from the defendant. The parties have since quarrelled and it is scarcely denied that the plaintiff's object in bringing the suit is rather to injure the defendant than to benefit himself. It is, however, argued that in default of registration, the land remained the property of the plaintiff as under the Transfer of Property Act, the transfer could only be made by registered instrument and that the defendant is not entitled to the benefit of any of the equities which English Courts raise in such a case against the application of the Statute of Frauds. As observed in *Maddison* v. *Aldersan* (1), that Statute did not make the transaction itself void whereas it is contended that was the effect of the Transfer of Property Act and the Full Bench decision of this Court [*Kurri Veerareddi* v. *Kurri Bapireddi* (2)] was relied on. It was held in that case, when the price had been paid and possession delivered but the sale-deed had not been registered, that the vendor was entitled to get back the property and that the contract to sell, afforded no defence even though the defendant's right to sue for specific performance, was not barred at the institution of the suit. White, C. J., arrived at this conclusion with some hesitation having regard to the observations of their Lordships of the Judicial Committee in *Immudipatam Thirugnana Kondama Naik* v. *Periya Dorasami* (3), and it may be necessary when the time comes to consider how far the decision of the Full Bench can be reconciled with very general language used by their Lordships in the more recent case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (4)

(1) 8 A. C. 467 = 52 L. J. Q. B. 737.
(2) (1906) 29 Mad. 336.
(3) (1901) 24 Mad. 377 = 28 I. A. 46 (P. C.)
(4) A. I. R. 1914 P. C. 27 = 42 Cal. 801 = 28 I. C. 930 (P. C.)

though no doubt the transaction there in question took place before the passing of the Transfer of Property Act and the effect of its provisions is not referred to in the judgment. But assuming *Kurri Veerareddi* v. *Kurri Bapireddi* (2), to be correctly decided, I am not prepared to hold that it involves the proposition that where there is no registered document, no amount of acquiescence on the part of the transferor will bar his right to get back the property within statutory period. Where a lessee for a limited term erects buildings on the land and the lessor stands by and says nothing, it was no doubt held in *Ramsden* v. *Dyson* (5) and *Beni Ram* v. *Kundan Lal* (6), that the mere acquiescence of the lessor, will not debar him from recovering the land at the expiry of the term. In *Immudipatam Thirugana Kondama Naik* v. *Peria Dorasami* (3), the plaintiff sued in the year 1895 for a declaration of his title and for redemption. The mortgage in 1882 by the plaintiff's father in favour of the mortgagees provided that on redemption, the property should be handed over to the contesting defendant ; but their Lordships found, not only that there was no registered transfer as required by the Transfer of Property Act, but that it was not proved that there was any valid contract by the plaintiff's father to make the transfer to the defendants. If there had been such a contract, their Lordships were of opinion that it would have been a good defence as the defendants might call on the transferor's heir to supplement the contract and this, though the suit was brought more than twelve years after the date of the alleged transfer. The present case is undoubtedly much stronger. Not only was there a contract to exchange, but it was fully performed and long afterwards, the plaintiff stood by and acquiesced in the defendant's building and obtained a further payment from him. In these circumstances, putting aside the conveyance altogether, I think the plaintiff is estopped. Key, J., in *McManus* v. *Cooke* (7) cited and old case *Anon* (8), which is both brief and opposite : "*Short* v. *Taylor*, in Lord Somer's time, was cited, which was, Short built a fine house; Taylor began to build another; but laid part of his foundation upon Short's land. Short seeing this, did not forbid him, but on the contrary very much encouraged it ; and when the house was built, he brought an action ; and Lord Somer granted an injunction." The plaintiff's conduct in this case has been far worse than that of Short. It is clear, observes Key, J., in *McManus* v. *Cooke* (7) citing this case, that if a man builds a house partly on his neighbour's land, and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it. Assuming *Kurri Veerareddi* v. *Kurri Bapireddi* (2), to be rightly decided, I do not think it prevents us from applying this rule in India, or obliges us to countenance a purely vexatious suit such as this. I may also refer to *Plimmer* v. *Mayor of Wellington* (9) and *Attorney-General of Southern Nigera* v. *Holt and Company* (10), which were cited before us as supporting the same view. I would, therefore, uphold the decree though on different grounds and dismiss the appeal with costs. In the result, the appeal is dismissed with costs.

Seshagiri Aiyar, J.—I have the misfortune to differ from the learned Chief Justice. The main facts are not in dispute. By a deed dated the 4th March 1908, there was an exchange of building sites between the 1st plaintiff and the 1st defendant. The 1st defendant erected a wall on the exchanged site and put up a substantial building. This suit was instituted in 1911 for recovery of the site after removing the building on it. The case for the plaintiff is that as the deed was not registered, no title passed to the plaintiff. The Subordinate Judge held that the document was not a deed of exchange and that the real exchange was effected by the award of arbitrators. Mr. Krishnaswami Aiyar for the respondent, drew our attention to the evidence on this point. We feel no hesitation in holding that the document is a deed of exchange and that there is no satisfactory evidence to prove that the arbitrators gave an award as to the exchange. The evidence does not show that there was any antecedent dispute relating to the exchange. There is no reference in writing. On the evidence, it is clear that all the mediators were called upon who were to fix the prize to be paid by the defendant as he was taking a larger extent than the plaintiff obtained from him. The evidence on the side of the plaintiff is clear

(5) (1870) 14 W.R. 926.
(6) (1899) 21 All. 496 ; 25 I.A. 58 (P. C.).
(7) (1887) 35 Ch. D. 681=56 L. J. Ch. 662.
(8) 2 Eq. C. Ab, 522 ; 22 E.R. 440.
(9) 9 A. C. 699 ; 53 L.J.P.C. 104 .
(10) (1915) A. C. 599=84 L.J.P.C. 98.

and consistent and we accept that, as being more in accordance with the probabilities of the case. We cannot accept the finding of the Subordinate Judge on this point.

The question of law arising on these facts is whether the plaintiff is not entitled to recover possession, because of his conduct in allowing the 1st defendant to erect a substantial building at a great cost. There can be no doubt that the plaintiff has no merits and his conduct has not been above board. Still if the law is in his favour, the Court will not be justified in refusing him relief.

The Full Bench decision of this Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (2) lays down that if the party resisting possession has no statutory or prescriptive title, he cannot rely on equities to resist the suit. Mr. Krishnaswami Aiyar contended that this decision must be taken to have been overruled by the decision of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (4). I am unable to agree with this contention. In the case before their Lordships, there was a compromise in a suit. The compromise with reference to certain portions of it, should have been registered. This was not done. But in pursuance of the terms, the parties were placed in possession and dealt with the properties as owners. Their Lordships held "that even although the *razinama* and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties has been such as to supply all such defects." Before the Transfer of Property Act, the law did not prescride any formalities for conferring title. Under the old Registration Regulations and Acts, if a document of a particular description was in writing but not registered, it was not receivable in evidence. Therefore, the document commented upon by their Lordships, was not *ipso facto* invalid, only it was not receivable in evidence. To such a case, the decisions which construed the Statute of Frauds in England were held applicable. As pointed out by Mr. Srinivasa Aiyangar, the reference in the judgment of the Judicial Committee in *Maddison* v. *Alderzon* (1) shows that their Lordships were not considering cases for which the Statute has prescribed a particular form for conferring title. The judgment of some of the noble Lords in that case would seem to show that the principle of equitable estoppel can apply only to executory contracts and not to executed contracts. See specially the Judgment of Lord Blackburn. I do not think that the Judicial Committee intended to lay down that even where a Statute enjoins that title would pass only if certain formalities are complied with, conduct and acting can be relied upon to supplement an inchoate title. S. 54 of the Transfer of Property Act says that a "transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of reversion or other intangible thing, can be made *only* by a registered instrument." The second clause of S. 118 is "A transfer of property in completion of an exchange, can be made *only* in the manner provided for the transfer of such property by sale." The use of the word "*only*" in these sections excludes the possibility of title being acquired within the statutory period by any other process. I feel no doubt that their Lordships of the Judicial Committee did not intend to override statutory requirements by their observations. Their Lordships have always held with reference to Indian enactments that "the essence of a Code is to be exhaustive" See *Balkishen Das* v. *W. F. Legge* (11); *Dhanipal Das* v. *Maneshar Bakhsh Singh* (12); *Gokul Mandar* v. *Pudmanund Singh* (13); *Webb* v. *Macpherson* (14); *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (15). I am, therefore, of opinion that *Kurri Veerareddi* v. *Kurri Bapireddi* (2) is unaffected by *Mahomed Musa* v. *Aghore Kumar Ganguli* (4).

The next branch of the argument of Mr. Krishnaswami Aiyar relates to estoppel. If I understood him aright, he does not claim that the conduct of the plaintiff has given him a title to the property; his position is that Courts should not afford relief to the plaintiff as he is not entitled to it by reason of his

(11) (1900) 22 All. 149=27 I.A. 58 (P.C.).
(12) (1906) 28 All. 570; 9 O.C. 188=33 I.A. 118. (P.C.)
(13) (1902) 29 Cal. 707=29 I.A. 196. (P.C.).
(14) (1904) 31 Cal. 57=30 I.A. 238 (P.C.).
(15) (1913) 37 Bom. 198=17 I.C. 627=40 I. A. 24 (P.C.).

conduct. In other words, although in law the plaintiff has a title to recover, Courts should reject his claim on grounds of equity. Before I deal with the cases quoted by the learned Vakil, I shall refer to the principle which this contention seems to offend. The learned Vakil for the appellant invoked the aid of the well-known principle that there can be no estopped against law. I shall state what, in my opinion, are the uses and limitations of this rule before applying it to the present case. The rule of estoppel is one of evidence. It ought not to be allowed to prevail against a statutory right. There are many instances in which parties have been held entitled to equities, using that term in the sense of estoppel although, as pointed out by Jenkins, C. J., in *Municipal Corporation of Bombay* v. *Secretary of State* (16), the two rights are distinct. Even against a Statute, equity may be relied upon in certain cases. The provision in the Statute may be directory and not mandatory. Equity will relieve against its strict enforcement. Certain penalties may be held *in terrorem* with a view to the prompt obedience of the statutory rule. Equity will help to relieve the rigour of the law in such cases. Under a rule of law, time may not be of the essence of the contract. Here is room for the application of equity. Apart from these and similar instances, in my opinion, no principle of equity or estoppel should be allowed to prevail against a plain and mandatory provision of law. Where the law says, as in the present case, that title can be acquired only in a particular way, there is no room for the application of the doctrine of estoppel. The effect of holding otherwise, would be to override legislation. Courts will then be creating a title which the Legislature has distinctly negatived. Whatever may be the position in England before the Judicature Act, when equitable relief was given along with and often in opposition to common law remedies, I do not think the Courts in this country have power to nullify legislative provisions. The authorities in this country support this proposition. *Chidambara Chettiar* v. *Vaidilinga Padayachi* (17); *Dhiraj Chandra Bose* v. *Srimati Hari Dasi Debi* (18); *Jagadbandhu Saha* v. *Radha Krishna Pal* (19) Mr. Krishnaswami Aiyar referred to the dictum of Lord Kingsdown in the well known case of *Ramsden* v. *Dyson* (5). The actual decision in that case was that as no expectation was held out to the tenant, the landlord was not estopped. Lord Kingsdown dissented from the conclusion of the other noble Lords. The argument before the House of Lords was directed to showing that by the conduct of the landlord, an equity was created in favour of the tenant. No question of statutory command or prohibition had to be dealt with in that case. I do not think the pronouncements of Lord Kingsdown and of the other noble Lords are relevant to cases where the courts are asked to act in direct contravention of enacted law. *Attorney-General of Southern Nigera* v. *John Kolt and Company, Liverpool* (10), is not really against this view. In that case, the respondents had acquired by a grant from the Crown certain lands of which the sea was the bonndary. As a result of the erection of protective works by them, a strip of land accreted to that already possessed by them. The Crown claimed this accretion. It was conceded that ordinarily the accretion would go to the Crown ; but it was contended that having agreed to give access to the sea by the original grant, the Crown was estopped from laying claim to this piece of land so as to derogate from the right already granted. This contention was upheld. At page 620, their Lordships say : " In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a license had been granted and duly accorded to the respondents to reclaim, as was done, that license would have been in entire accord not only with the right of the subject but with the duty of the Crown. This principle is in accord with the law laid down in *Attorney-*

(16) (1905) 29 Bom. 580.
(17) 38 Mad. 519; 30 I. C. 408.

(18) (1915) 42 Cal. 765=29 I. C. 290.
(19) (1909) 36 Cal. 920=4 I. C. 414.

General v. *Tomline* (20) and principally with the opinion of Fry, J., at the trial [*Attorney-General* v. *Tomline* (21)] and Cotton, L. J., in the Court of Appeal [*Attorney-General* v. *Tomline* (21)]." As I understand this judgment, the Judicial Committee were inclined to think that the grant of land implied a license to reclaim as well. The reference to *Lyon* v. *Fishmonger's Company* (22) and other cases shows that their Lordships were prepared to presume from the nature of the grant, a right in the respondents as grantees to erect walls in the foreshore in order that the benefits arising from the original grant may be properly enjoyed. One other observation may be made with reference to this case. No question of statutory title as in the present appeal, arose in it. *Sarat Chunder Dey* v. *Gopal Chunder Laha* (23) was much relied upon by the respondent. In that case, the title-deed was in the name of the mother. The son had allowed her to deal with the property. The son's property passed under the Court sale to the plaintiff and the defendant claimed title under the mother by virtue of another Court sale on the mortgage created by her. It was found that the mother was only a *benamidar* for the son. Their Lordships of the Judicial Committee held that the son would have been estopped from questioning his mother's dealings as she had the ostensible title in her to the property, and that consequently persons claiming under the son, were similarly estopped. I fail to see how this case affords any help to the respondent. The estoppel pleaded, related to the claim as real owner against a person having *prima facie* the statutory title. The other cases quoted, do not require any detailed examination. I am of opinion that the plaintiff was not estopped from suing to recover the property. I further agree with the contention of the learned Vakil for the appellant that S. 115, which has been held to be exhaustive of the law in India [*Asmatunnessa Khatun* v. *Harendra Lal Biswas* (24)], does not cover this case. However reprehensible the conduct of the plaintiff may be, there is no suggestion in the evidence that at the time the defendant erected his house on this land, he was aware that he alone had title to the property and not the defendant. The plaintiff has no doubt taken advantage of the infirmity in the defendant's title; but it is not shown that he was aware of this infirmity when building operations commenced and intentionally led the defendant into the belief that he had a valid title. The truth seems to be that until about the time of the suit, both parties believed that a good title had been secured by the document of 1908. In this view, the plaintiff cannot be said to be estopped from claiming the property. See In re *Barrow's* case (25).

The only other point is whether the plaintiff should be allowed to recover the property without paying substantial compensation to the defendant. Under the Transfer of Property Act, there is no question that the option should be given to the transferor to elect either to convey the property validly or to pay compensation. Mr. Srinivasa Aiyangar says that his client elects the latter alternative. He also contended that the Act in terms would not apply to the present case. S. 51 of the Transfer of Property Act speaks of the transferee of immoveable property making improvements. Without expressing any opinion whether the term 'transferee' would apply to persons who have obtained invalid transfers, I think the principle of the section governs the present case. The plaintiff, in my opinion, must pay substantial damage before he is given a decree for possession. As the question has not been dealt with by the Court of first instance, the Subordinate judge should be allowed to return a finding on the 4th issue in the view I have taken of the case. The proper course will, no doubt, be to appoint an expert Commissioner to determine the extent of the damage that is likely to accrue and to give an estimate of the compensation to be paid.

S. N./R. K.

Appeal dismissed.

(20) (1880) 14 Ch. D. 58=49 L. J. Ch. 377.
(21) (1878) 12 Ch. D. 14=47 L. J. Ch. 473.
(22) 1 A. C. 662=46 L. J. Ch. 68.
(23) (1893) 20 Cal. 296=19 I. A. 203 (P.C.).
(24) (1908) 35 Cal. 904.
(25) (1880) 14 Ch. D. 432; 41 L. T. 755.

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Full Bench

WHITE, C. J., MILLER AND SANKARAN NAIR, JJ.

Angammal—Appellant.

v.

Malic Mahomed Syed Aslami Sahib—Respondent.

Letters Patent Appeal No. 59 of 1911, decided on 28th April 1913, against the decision of Chief Judge, in O. S. Appeal No. 7 of 1910.

Transfer of Property Act (4 of 1882), S. 108—Substantial superstructure by lessee—Lease renewed—Pending lease suit for ejectment—Decree passed—On failure to comply plaintiff put in possession—Held if after sufficient time superstructure not removed defendant not entitled to remove it afterwards or to get compensation—(Per Sankaran Nair, J. Dissenting)—Tenant should remore or landlord may remove structure and claim damages.

In 1883, *A.* took a lease from the predecessor-in-title of *B.* and then erected a substantial superstructure thereon. The lease was renewed again in 1898. While in possession under that lease, a suit in ejectment was filed against *A*, in 1906 and *A*, was ordered to deliver possession of the lands on or before 26th February 1907, without determining any of the rights set up by him thereto. On his failure to do so, *B.* was put in possession on that date. *A.* then sued for possession of the house or removal thereof or in the alternative compensation for it :

Held, Per *White*, *C. J.* and *Miller*, *J.* (*Sankaran Nair J.*, dissenting) :—That *A.* was not entitled to any of the reliefs sought.

Per *Miller*, *J.*—According to the customary or common law of the land, on the determination of the lease, the option is with the lessor either to take the building on paying compensation or, if he is unwilling to pay compensation, to allow the tenant to remove the building. If the landlord elects to allow the tenant to remove the building, he must allow him a reasonable time after the determination of the tenancy in which to effect the removal. If he has had enough time after the determination of the lease to remove the building and has not done so before he gives up possession, he has no right to do so.

[P. 221, C. 1 & 2.]

Apart from estoppel or contract, the tenant has no right to demand removal of the buildings left by him on the premises when he quits them, whether those buildings were erected with the landlord's consent or not, or to demand compensation for them. [P. 220, C. 2.]

Per *Sankaran Nair*, *J.*—A tenant is bound to remove the building within a reasonable time or before he surrenders possession, but his ownership is not lost if not exercised within reasonable time. The landlord may restore the land to its own condition and claim damages. [P. 222, C. 1.]

K. Naraina Row—for Appellant.

C. Venkatasubbaramiah—for Respondent.

White, C. J.—I adhere to my former judgment and I think that the appeal should be dismissed with costs.

Miller, J.—As regards the point that the building was not attached to the land by the plaintiff or her husband during the tenancy under Exhibit II, a point, which was not taken in the Court below, I do not think it is necessary to hold that S. 108 of the Transfer of Property Act would be inapplicable to the case. So far as I can see, the recognition, for the period of the new tenancy, of the tenant's property in the building has no other necessary effect than to prevent the landlord from treating the building as having been surrendered to him at the end of the previous term ; it may be taken as evidence of a contract to allow the removable fixture to remain *as such* upon the land for the new term. I find nothing inconsistent with this view in Exhibit II and the effect, so far as the tenant's right to the building is concerned, is to reserve to him for the new term whatever rights he had during the old term and not to create new rights, that is, rights distinct in kind from the old ones. There is no necessity, I think, to infer the creation by Exhibit II of any more extensive right than the plaintiff's husband had before, and seeing that the point was not taken on behalf of the plaintiff below, we may, therefore, not have before us all the available evidence. I am not prepared to draw any inference in the plaintiff's favour which the words of Exhibit II do not necessarily import.

As to the question of compensation, I think it is clear that it is not the law that apart from estoppel or contract, the tenant has any right to demand compensation for buildings left by him on the premises when he quits them whether these buildings were erected with the landlord's consent or not. Consent will only be of use to the tenant as leading to an estoppel or as evidencing an agreement. I see no reason, if I may say so, to doubt the correctness of the statement of law on this point in *Ismail Kani Rowthen* v. *Nazarali Sahib* (1).

As to the facts, I am content to accept them as found by the learned Judge who heard the evidence. His estimate of it was not seriously attacked in the argument addressed to us on behalf of the appellant.

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(1) (1904) 27 Mad. 211.

He finds that there is no trustworthy evidence of an express consent on the part of the original landlord to the erection of the house—but that it is clear that the 1st defendant, the original landlord's successor, knew of the additions made to it. I agree with him that this being the state of the evidence and having regard to the conditions of the tenancy, there is no room for a presumption that there was any undertaking by the landlord to pay for the house if the tenant did not remove it. Even if it can be presumed that the house was originally built with the knowledge of the then landlord, that will not be enough; and I venture to think that recognition of ownership is of no effect at all; the law gives the tenant ownership during the term and the landlord's recognition of that will not estop him or be evidence of an agreement.

There remains the question whether the tenant's right of removal ceases with the expiration or determination of the tenancy, or if not then, when?

The question is dealt with in *Ismail Kani Rowthen* v. *Nazarali Sahib* (1). It is there pointed out that in S. 108 (*h*) of the Transfer of Property Act, "nothing is said as to the rights of parties in respect of such things after the determination of the lease, if they have not been already removed by the tenant. The question may arise whether the tenant forfeits all his rights in such things it he has not so removed them, and in the absence of any contract on that point, the question will have to be solved with reference to 'local usage,' whatever may be the precise sense in which that expression is used in S. 108." This last sentence, no doubt suggests a misreading of the section by the learned Judge, but that does not, I think, affect the following passage which, as I understand it, contains his solution of the question. "According to the customary or common law of the land, as laid down in the case of In the matter of *the petition of Thackur Chandra Paramanik* (2), the option, in such cases, will be with the lessor either to take the building on paying compensation, or, if he is unwilling to pay compensation, to allow the tenant to remove the building." And this solution seems to be in accordance with the cases in India.

Inasmuch then as the lessor's right of election comes into operation only after the expiration or determination of the tenancy, for till then he has no right to interfere, it follows that, if he elects to allow the tenant to remove the buildings, he must allow him a reasonable time after the determination of the tenancy, in which to effect the removal, and accordingly the Courts in India, as is pointed out by Sankaran Nair, J., have been in the habit, when making decrees in ejectment suits, of postponing execution for a period of sufficient duration to enable the tenant to remove his buildings, if he so desires, before surrendering possession and in *Beni Ram* v. *Kundan Lal* (3), the Privy Council took a similar course and in making a decree for ejectment allowed the tenant to remove his building.

It is for the landlord to give a reasonable time but the Courts will not count the time against the tenants so long as the landlord's right to demand possession is in dispute. It would be inequitable to require the tenant to pull down his buildings before the question of his liability to give up possession is decided. Hence the time is counted from the date of the decree.

But there is nothing in any of the cases, or in the texts of the Hindu and of the Muhammadan Law-givers cited in the cases, to suggest that after possession has been given up to the lessor, the lessee retains any right to remove the buildings or to demand compensation for them. If he has had time after the determination of the lease to remove the buildings and has not done so before he gives up possession, then I am satisfied he has no further right to do so. It is not necessary in this case to decide whether the buildings are to be held to be "a gift in law to him in reversion" or to be forfeited, or abandoned, or whether it is only the right of recovery from the lessor that is barred. The result is the same so far as we are concerned with it.

Now, in the present case, possession was obtained by means of an ejectment order of the Presidency Court of Small Causes, and the procedure of that Court does not, we

(2) (1866) 6 W. R. 228 (F. B.)

(3) (1899) 21 All. 496=26 I. A. 58 (P.C.).

are told, admit of the postponement of the execution which in other cases is effected by the decree. Nevertheless the tenant is by law entitled to a reasonable time and opportunity to remove his buildings, and, as I have above pointed out, that time must generally at any rate be dated from the ejectment order and not from the termination of the tenancy. The question is, therefore, has the tenant been given that reasonable time and opportunity by the landlord? If not, the Court will give it now or make the landlord pay compensation. If so, the tenant has no further right to remove the building.

There can be no doubt, I think, that the answer must be that the tenant has been given ample time and ample opportunity of removing the building after he gave up possession in February 1907, and that being so, his suit was rightly dismissed and this appeal must be dismissed with costs.

Sankaran Nair, J.—I have read the judgment of Miller, J. For the reasons already given by me, I agree with the view that the improvement of the building in this case belongs to the tenant, the appellant, and that he is entitled to remove it, if the defendant is not willing to pay him its value. I am unable to agree, however, with the view that ownership is lost, if not exercised within a reasonable time. The tenant is bound to remove the building within a reasonable time or before he surrenders possession. If he does not do so, I fail to see how it has the effect of transfer of ownership. The landlord may restore the land to its old condition and claim damages.

The law as to right to compensation laid down by my learned colleagues following the decision of *Ismail Kani Rowthen* v. *Nazarali Sahib* (1), is, undoubtedly, the English law. The English Common Law has been harsh and oppressive to tenants and is not a law of justice, equity and good conscience. Indian agricultural prosperity is built on tenant's labour. Indian legislation, both local and imperial, has been steadily directed towards getting rid of the consequences that followed the application of the English Law of Landlord and Tenant based on contract to India where such relation is regulated by custom. In the Madras Presidency, the Saddur Court in 1859 and eminent Judges of great experience like Holloway and Innes laid down a different principle which I followed in my judgment under appeal. As between the two, I have little hesitation in making up my mind to follow their decision in *Mahalatchmi Ammal* v. *Palani Chetti* (3).

It is true that the question that the building was not attached during the tenancy was not raised in the Court below. But Exhibit II was a part of the plaintiff's case and it was for the defendants to raise any plea that may get rid of the inference to be drawn from Exhibit II.

S. N./R. K.

Appeal dismissed.

(3) (1870-71) 6 M. H. C. R. 245.

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AYLING AND SESHAGIRI AIYAR, JJ.

Saripalli Venkatarayagopala Raju – Defendant – Appellant.

v.

Fota Narasayya — Plaintiff—Respondent.

Second Appeal No. 371 of 1913, decided on 3rd September 1914, against the decree of Tempy., Sub-Judge., Masulipatam, in Appeal Suit No. 435 of 1911.

Evidence Act (1 of 1872), Ss. 13 and 32—(Per Ayling, J.) Meaning of "transaction" in S. 13 stated—What documents, are admissible under S. 13 (a) as transaction explained—Sale deeds between strangers are not admissible either under S. 13 or 32—(Seshagiri Aiyar, J. contra.)

The word "transaction" in S. 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons. [P. 223, C. 1 & 2.]

In a case where certain properties were claimed as the property of a particular family, the following documents were put in evidence :—

(1) Sale-deeds executed by the widows of the family asserting that the properties covered by them belonged to their husbands;

(2) written statements filed by them in suits to which they were parties and in which they had made recitals;

(3) Recitals in a sale-deed between third persons in which, in describing the boundary of the property sold, the suit property was described as that of the particular family.

Held, (Per *Ayling, J.*)—that the documents mentioned in (1) and (2) were admissible in evidence under S. 13 *a*) of the Evidence Act, as "transactions;" but the documents mentioned in (3) were not admissible in evidence either under S. 13 (*a*) as a "transaction" or under S. 32 as an admission against interest. [P. 223, C. 1 & 2.]

Per *Seshagiri Aiyar, J.*—That all documents were inadmissible in evidence

6 Cal. 171; 8 I. C. 268; and 23 Bom. 63 Diss from. 8 I C. 268; and *Jones* v. *Williams*, 2 M & W. 326, Foll.

P. Narayanamurthi—for Appellant.

B. N. Sarma--for Respondent.

Ayling, J.—The sole ground of appeal argued before us is that the judgment of the lower Appellate Court is based on inadmissible evidence, *i.e.*, Exhibits A and A1, B and B1 and G.

As regards Exhibits A and A1, I am inclined to hold that they are covered by S. 13 (*a*) of the Indian Evidence Act. Plaintiff has to establish the title of his vendors to the suit land; but this turns mainly on whether the land belongs to the Tangella family of which they are members. The case set up by defendants was not that the person entitled to dispose of it was some other member of that family. They pleaded that it never belonged to the Tangella family at all, but was acquired by 1st defendant's great-grandfather and that the name it bore ("Tangellavari Doddi") had no significance.

I think the right of the Tangella family to the plaint land was in question in this suit. Exhibits A and A1 are sale-deeds in which two widows of the Tangella family sold the same property to strangers, as if it was Tangella family property.

These are transactions by which other members of the Tangella family asserted the same right which is now in question. It is not necessary that the assertion should be by parties to the present suit or their predecessors. I consider that Exhibits A and A1 come under S. 13 (*a*) of the Indian Evidence Act.

Exhibits B and B1 are copies of the written statements filed by the same two widows in subsequent litigation. They are mentioned, but hardly seem to be relied on by the Subordinate Judge. I do not regard such documents as "transactions" within the meaning of S. 13 of the Indian Evidence Act. The words of this section must, in my opinion, be strictly construed. I would respectfully adopt the definition of "transaction" given by Garth, C. J., in *Gujja Lal* v. *Fatteh Lal* (1) as a "business or dealing which is carried on or transacted between two or more persons." The sale-deeds (Exhibits A and A1) fall within this definition, but not these written statements filed in the subsequent suit, and I consider the latter to be inadmissible.

Exhibit G is a sale-deed of an adjoining site between strangers which, in specifying boundaries, describes the suit land as belonging to Tangella Ramudu. This is a transaction, but it is not a transaction by which the right of the Tangella people is asserted, claimed or even recognised: it is a transaction in which the said right is incidentally mentioned. It is not admissible under S. 13 (*a*) and I agree with my learned brother, following In re *Daddapaneni Narayanappa* (2), that it cannot be treated as an admission against interest.

I am, therefore, inclined to hold that Exhibits B and B1 and G are not admissible. But I agree with my learned brother that having regard to S. 167 of the Indian Evidence Act, it is not necessary to interfere with the decree of the lower Appellate Court on this ground alone.

I would dismiss the appeal with costs.

Seshagiri Aiyar, J.—The plaintiff claimed the plaint property by purchase from Tangella Dharmayya and others. First defendant claimed it as his own. The main issue related to the title of the Tangella people. The Subordinate Judge, differing from the Munsif, came to the conclusion that the property belonged to plaintiff's vendors, the Tangella people, and not to 1st defendant. This finding is attacked on the ground that it is based on inadmissible evidence. Exhibits A and A1, B and B1, and G are objected to. A and A1 are sale-deeds by some widows of the Tangella family in which they said that the property belonged to their husbands. B and B1 are written statements by these widows in a suit wherein also they pleaded that the property belonged to their husbands. Exhibit G is a sale-deed of a piece of land by a neighbouring owner in which, in describing the boundaries, the plaint property is described as that of the Tangella people. The respondent's Vakil cited *Ningawa* v. *Bharmappa* (3) in support of

(1) (1881) 6 Cal. 171.

(2) (1910) 8 I. C. 268.

(3) (1899) 23 Bom. 63.

the position that the recitals in these documents were evidence. That was a case in which the executants were dead and the learned Judges said that the recital in a mortgage-deed describing the plaint site as belonging to a particular person was a statement against the interest of the person executing the mortgage-deed, inasmuch as he did not lay claim to the property which bound his. With all respect, I am unable to agree with this view. If this is correct, it would follow that any person who states that a particular property belongs to another should be held to have made a statement against his interest, because he lays no claim to it himself. I respectfully differ from *Ningawa* v. *Bharmappa* (3). I agree with Mr. Justice Krishnasamy Iyer in In re *Daddapaneni Narayanappa* (2) that such recitals are not evidence under S. 32 of the Evidence Act.

The more difficult question for consideration is whether they can be admitted under S. 13 of the Evidence Act. There is no authority for the proposition that the recital, in order that it may be admissible, must have been made by a party to the suit or by a person through whom he claims. The language of the section imposes no such restrictions. But I am inclined to think that these documents are not transactions *by which* the right in question was asserted or recognised. In the case of G, there can be no doubt that the transaction, namely, the sale-deed did not assert or recognise the right of the Tangella people. The definition of the term "transaction" given in the well-known case, *Gujja Lal* v. *Fatteh Lall* (1), makes it clear that the description of the boundary is not a transaction (see definition of "transaction" per Jackson, J., and Garth, C. J., in that case). As regards A and A1 the widows state that the property belonged to their husbands. It is not a transaction in which the right of the vendors in this case was asserted. B and B1 are of the same character. It may be suggested that these documents came under clause (*b*) of S. 13. In order to hold that the recitals in these documents are "instances," it must be shown in the language of Baron Parke in *Jones* v. *Williams* (4), that there must be a common character of locality or of continuity to make the evidence let in, an "instance" of the question to be decided. I am of opinion that these statements in the sale-deeds are not *instances* as contemplated in clause (*b*).

I, therefore, hold that these documents are not admissible to prove the right of the Tengella people. Exhibits A and A1 are, however, admissible for another purpose. The land in dispute was known as the '*Tangella people's site.*' Evidence is admissible under Ss. 95 and 96 of the Evidence Act to explain this expression, and it is for this purpose the Subordinate Judge has used these documents. They show that the Tangella people laid claim to the suit site. This evidence repels the suggestion of the defendant that the expression is only descriptive of the property and does not mean that the Tangella people had a right to it. My conclusion is that A and A1 were rightly considered by the Subordinate Judge. Although I have held that the Subordinate Judge was wrong in referring to Exhibit G and that Exhibits B and B1 are not evidence. I am of opinion that independently of these documents there was sufficient evidence upon which the Subordinate Judge was entitled to come to the conclusion at which he has arrived.

I am satisfied that these three documents did not materially influence him in his finding. S. 167 of the Evidence Act applies. It is, therefore, unnecessary to send the case down for hearing. I agree that the second appeal should be dismissed with costs.

S.N./R.K.

Appeal dismissed.

(4) 2 M. & W. 326; M. & H. 51.

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OLDFIELD AND TYABJI, JJ.

Nathersa Rowther—Defendant—Appellant.

v.

Mahomed Rowthan and *others*—Defendants and Plaintiff—Respondents.

Appeal No. 114 of 1913 and Appeal against Appellate Order No. 24 of 1914 decided on 8th December 1914, against the decrees of Sub-Judge, Kumbakonam in Appeal Suits Nos. 15 and 432 of 1912.

(a) Court-Fees Act (7 of 1870), S. 11—No special procedure is necessary for dismissal for default of payment if parties have notice.

No special procedure for dismissal for default in payment of Court-Fee under S. 11 is necessary so long as it is clear that the parties have had fair notice of the nature of the proceedings. [P. 226, C. 1.]

(b) Court-Fees Act (7 of 1870), S. 11—In proceedings under O. 20, R. 12, Civil P. C.—Plaintiff called to pay additional Court-fee by fixed date—Dismissal for default held not proper.

Where in proceedings for the ascertainment and recovery of profits in a partition suit an order was made ascertaining profits and directing the decree-holder to pay additional Court-fee on or before a fixed date :

Held, the order was merely inserted incidentally in a decision on an application made by the decree-holder for a different purpose, there was no adjudication or valid dismissal of the suit. [P. 226, C. 1.]

(c) Civil P. C. (5 of 1908), Ss. 148 and 149—S. 148 or 149 does not empower Appellate Court to extend time or reduce Court-fee ordered.

An Appellate Court can neither extend the time fixed by the first Court for payment of the Court-fee nor reduce the amount awarded and that Ss. 148 and 149 do not give it this power either separately or jointly. [P. 227, C. 2.]

T. Rangachariar and *K. S. Jayarama Aiyar*—for Appellant.

G. S. Venkatarama Aiyar and *G. S. Ramachandra Aiyar*—for Respondents.

Oldfield, J.—These appeals relate to proceedings for the ascertainment and recovery of profits in a partition suit. The decree in Original Suit No. 63 of 1901 on the file of the District Munsif of Mannargudi was passed under the former Code and directed ascertainment of past and future profits in execution. The decree-holder, 1st respondent, applied for ascertainment in Execution Petition No. 228 of 1910, and an order was passed on 22nd March 1911 ascertaining profits and directing him to pay additional Court-fee, Rs. 227-8, on or before 6th April 1911. This payment was not made, 1st respondent merely applying in the ensuing September for leave to execute on condition that the amount should be credited from anything realised from appellants, the judgment-debtors, and in October for leave to executive to recover the past profits on payment of the Court-fee calculated on them. In November he applied in Execution Appeal No. 618 for an extension of time for the payment and to have the delay excused, and in Execution Petition No. 666 for execution. It is contended by appellants that the orders on the last-mentioned applications amounted to a dismissal of the suit for profits under S. 11, Court Fees Act ; and it will be necessary to decide whether this is so. Meanwhile appellants had appealed against the order on Execution Petition No. 228 ; and in the order, which is the subject of Appeal against Order No. 24 of 1913, the lower Appellate Court reduced the amount awarded by the District Munsif and allowed one month for payment of the Court-fee on this reduced amount. Consistently with this decision it, in Appeal Suit No. 15 of 1912, set aside the Distrirt Munsif's dismissal of Execution Petition No. 666 and remanded it for disposal ; and that order is the subject of appeal against Order No. 114 of 1913.

The arguments first calling for consideration are these : in Appeal against Order No. 114, that (1) 1st respondent's obligation to pay the Court-fee fixed by the District Munsif's order on Execution Petition No. 228 was not in any way suspended or affected by the fact that an appeal against that order was filed by appellants, even though in it the amount payable was eventually reduced and the time for payment extended ; (2) the failure to fulfil that obligation entailed the dismissal of the suit, so far as it related to profits, under S. 11, Court-Fees Act ; (3) after that dismissal the lower Appellate Court could not deal with the decree for profits in appeal, since it had ceased to exist ; (4) the lower Appellate Court was not authorised by S. 11 or any other provision of law to fix time for payment of Court-fee in respect of profits, when they had been ascertained and time had been fixed by the District Munsif and no additional fee was payable under its order.

Much careful argument has been addressed to us in support of these contentions. But of the first three only one calls for examination, that the suit for profits was dismissed. For, if there was no legal dismissal of it, it cannot matter for the present purpose whether or no 1st respondent's conduct would have entitled appellants to claim one or whether they will be entitled to claim one in other proceedings before the District Munsif. In order to decide whether there was a legal dismissal it is necessary to refer to

the orders on Execution Appeal No. 618 and Execution Petition No. 666, on which appellants rely. In the former the District Munsif refused to extend the time to enable 1st respondent to pay Court-fee or to excuse his delay in doing so. In the latter, passed on the same day, he said, "As Execution Appeal No. 618 is dismissed, suit in respect of mesne profits is dismissed. So this petition (for recovery of the profits in execution) is dismissed." The latter alone contains any statement as to the disposal of the suit. Yet it is on the former that Appellants rely as in effect dismissing it, though it does not do so in terms; and the reason for this preference is evidently that the latter was the subject of appeal to the lower Appellate Court and of appeal against Order No. 114 here, whilst the former has not been appealed against. But, whichever order is relied on, the result must be the same. The order in Execution Appeal No. 618 did not purport to dismiss the suit for profits and cannot be treated as having done so. The order on Execution Petition No. 666 which purported to do so, cannot be accepted as effecting a valid dismissal, because it was not passed after any claim to that relief had been made by appellants or after 1st respondent had had any notice that such a claim must be resisted. No doubt no special procedure for dismissal for default in payment of Court-fee is prescribed in S. 11, Court Fees Act, or elsewhere, and no special procedure need be insisted on so long as it is clear that the parties have had fair notice of the nature of the proceedings. But that is not clear in the present case, since 1st respondent had no notice that an order of dismissal would be passed against him, and what is alleged to be such an order was merely inserted incidentally in the decision on an application made by him for a different purpose. In these circumstances, it is not possible to hold that there was any adjudication or any valid dismissal of the suit. The lower Appellate Court may have been mistaken in its order in the appeal above referred to, when it assumed that only "the propriety of the order in Execution Appeal No. 618 dismissing the suit as to past and future profits," and not also its formal validity, was open to discussion. But the conclusion reached here, that it was invalid, is sufficient for the present purpose, since it entails that the majority of appellants' contentions must fail.

There remains their fourth contention, that the lower Appellate Court had no power to extend time already fixed for payment of Court-fee by the District Munsiff or to fix a fresh time, when its order did not direct the payment of any additional amount. If it is accepted, appellants will be entitled to move the District Munsif in a proper way to dismiss the suit for profits under S. 11 on account of 1st respondent's original default.

The powers of the lower Appellate Court must under S. 107, Civil Procedure Code, be taken to have been identical with those of the Court of first instance, since it has not been shown that distinct powers of the kind now in question are conferred on Appellate Courts by any special provision. It is accordingly contended that the lower Appellate Court possesses such powers, because the Court of first instance must be held to have possessed them under either S. 11, Court Fees Act, or Ss. 148 and 149, Civil Procedure Code, taken independently or together. The argument as to S. 11 is based on the judgment in *Golab Chand* v. *Bahuria Ram Murat Koer* (1). But the existence of a power to extend time is based therein on (1) the reasonableness of such an interpretation of S. 11, (2) a supposed analogy with the interpretation of S. 549, Civil Procedure Code, in certain Privy Council decisions; and with great respect it may be doubted whether a construction, which supplements a provision of law in itself workable and intelligible, is reasonable or legitimate whilst the analogy proposed is unsustainable in view of the restriction, introduced since the date of those Privy Council decisions, of the exercise of the power to enlarge time to acts prescribed or allowed by the Code, the payment of Court-fees under S. 11 not being on act of that description. And on the other hand, if the Appellate Court has the same power to fix time for payment of fees under S. 11 as the Court of first instance, that power must be exercised subject to the same restriction; that is, only in respect of fees calculated on profits, the amount of which it has itself ascertained. But here

(1) (1911) 10 I.C. 268.

the lower Appellate Court ascertained no amount, since it merely confirmed in part the ascertainment of the District Munsif ; and it, therefore, had no power to fix a time. It is possible that it might have had power to stay disposal of the suit for profits pending the appeal against the original award. But there was no stay or application for one in the present case. And in this Presidency it is settled that a merely affirming decree (or, it is to be supposed, when there has, as here, been a total default, a partially affirming one) does not give the plaintiff time for performing a condition. *Ramaswawi Kone* v. *Sundara Kone* (2). In these circumstances the argument based on S. 11 cannot be sustained.

That based on Ss. 148 and 149, Civil Procedure Code, can be dealt with shortly. So far as it is based on the former alone, S. 148, by which the powers of the lower Appellate Court when it passed its order must be taken to have been regulated, permits the enlargement of a period fixed by the Court for the doing only of an act prescribed or allowed by the Code ; and the payment, now in question, was primarily at least, prescribed or allowed only by the Court Fees Act. It is said, however, that it was allowed by S. 149. The history and wording of that section, however, negative the contention. It represents in a more general form S. 582 (A) of the former Code which authorised as regards appeals and applications for review, the use of the Court's discretion to permit payment, at any stage, of duty which had not been paid at the time of presentation through mistake, *Durga Charan Naskar* v. *Dookhiram* (3) and *Valambal Ammal* v. *Vythilinga Mudaliar* (4). That it contemplates cases in which the payment of duty is insufficient *ab initio*, not those, such as the present, under the second paragraph of S. 11, Court Fees Act, is apparent from (1) the restriction of the indulgence to cases of deficiency in the fee prescribed by law on any document, which is inappropriate if the fee to be ascertained as the result of inquiry is meant, (2) the reference to an immediate use of the Court's discretion which is inconsistent with the terms of S. 11 ; (3) the provision in its last sentence regarding the date from which the document shall take effect, which would be meaningless in the case of ascertainment of profits. Ss. 148 and 149 being inapplicable separately, it is difficult to understand the attempt to rely on them in combination. It is based on the suggestion that S. 149 makes payment of deficient duty an act permitted or allowed by the Code and, therefore, one covered by S. 148, and on the authority of *Golab Chand* v. *Bahuria Ram Murat Koer* (1). But this is unsustainable in view of the conclusion just reached as to the scope of S. 149 and the decision cited, which proceeds mainly on the application of S. 11, Court Fees Act, above referred to, merely mentions the combination of the two sections as a possible ground of decision and appears irreconcilable on this point with the judgment of the same learned Judge in *Budhan Shah* v. *Sita Nath Shah* (5). All attempts to support the power of the Court acting under section 11 to extend time failing, whether they are made directly with reference to it or indirectly with reference to other provisions, the absence of reference to such a power from the section must be decisive against its possession by the Court of first instance and, therefore, against its possession by the Appellate Court. The former can, no doubt, after the proper procedure has been followed, review its order fixing a time for payment and fix an enlarged time for appropriate reasons. But that is not material in the present connection. The conclusion must be against 1st respondent, that the portion of the lower Appellate Court's order extending time for payment was beyond its powers and must be set aside. Appeal against Order No. 114 is allowed to this extent, but is dismissed in other respects.

Appeal against Order No. 24 is argued against the decisions of the lower Appellate Court and District Munsif in Appeal Suit No. 432 of 1912 and Execution Petition No. 228 of 1910, allowing 1st respondent to recover 14 lots of *punja* land as covered by the decree under execution. It is urged that they are not covered by it and that the order for delivery is in effect an addition to it. The facts are that the decree, which incorporated the plaint schedules, awarded to 1st respond-

(2) (1908) 31 Mad. 28.
(3) (1899) 26 Cal. 925.
(4) (1901) 24 Mad. 331.

(5) (1910) 7 I. C. 578.

ent a share in 1st defendant's share of the *samudayams* proportionate to other specified land. No doubt there should, in accordance with the civil revision petition then in force, have been a preliminary and afterwards a final decree, the latter including a definite scheme for division dealing with each item of property. But there was in fact, in accordance with a very common practice only, one decree and the actual division was left to be made in execution. These lots, it is not disputed, are what 1st defendant obtained in a division of *samudayams* made among the villagers independently of this litigation, and there is no foundation for the contention that they either are not liable to division or are not included in the property, held in the decree to be liable to it. There is, therefore, no reason for interference on this point.

The memorandum of objections in this appeal is argued, *first*, on the ground that the lower Appellate Court failed to consider certain evidence, Exhibits B and C, in estimating the profits. It is not to be assumed that it did not consider it, because it did not refer to it explicitly; and it had good reason for not so referring to it, since as the District Munsif held it was open to objection.

Next, it is contended that the lower Appellate Court should have accepted the rate at which the District Munsif allowed profits and not limited the rate to that claimed in the plaint, because the claim was not made in the plaint approximately, but at an actual figure which should have been awarded with reference to *Baboojan Jha* v. *Byjnath Dutt Jha* (6). The answer is, *firstly*, that, though the language of the plaint is not clear and it included no offer to pay Court-fee on any amount eventually to be ascertained, the references in it to profits, which are evidently estimated at a round figure, are not clearly anything but approximate. And, *secondly*, the authority relied on has been superseded by *Gauri Prosad Koondoon* v. *Reily* (7), under which the specification of an amount in the plaint can be used only as evidence against the plaintiff, and not as limiting the amount which can be awarded. *Sooriah Row* v. *Cotaghary Boochiah* (8) has also been cited by 1st appellant and is no doubt a decision of the Privy Council. But the portion thereof relied on was not necessary to the disposal of any ground of appeal and their Lordships did not commit themselves to any approval of the course taken by the lower Court. Instances are, moreover, referred to in the last Calcutta judgment cited, in which the contrary course was followed. In these circumstances the lower Appellate Court's conclusion on this point cannot be sustained.

Appeal against Order No. 24 is accordingly dismissed with costs, and the memorandum is allowed to the extent that past profits will be awarded at the rate fixed by the lower Appellate Court for future profits. The lower Appellate Court's order for proportionate costs before it will stand. There will be proportionate costs in this Court. The additional Court-fee on the amount of profits now ascertained must be paid within one month from this date.

Tyabji, J.—I have read the judgment prepared by my learned brother. I agree that there was no dismissal of the plaintiff's suit as to mesne profits.

With reference to the question whether the lower Appellate Court had power to extend the time for payment of the Court-fee on the mesne profits as ascertained by itself, I see no way out of the reasoning of my learned brother showing that the lower Appellate Court can have no power to extend the time or to fix it on the basis of its own decree. The result is no doubt anomalous; but it is brought about in part by the anomalous nature and history of the proceedings and as my learned brother points out, the Court of first instance can, after the proper procedure has been followed, review its order fixing a time for payment and fix an enlarged time.

I have nothing to add to the other points mentioned in my learned brother's judgment. I entirely agree with the orders he proposes and his reasons.

S. N./R. K.

Appeal partly allowed.

(6) (1881) 6 Cal. 472.
(7) (1883) 9 Cal. 112.
(8) (1837-41) 2 M. I. A. 113=5 W. R. 127 (P.C.).

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SPENCER AND NAPIER, JJ.

Thuvoor Venkatasubba Reddy—Plaintiff—Appellant.

v.

Bagiammal— Defendant—Respondent.

Second Appeal No. 2404 of 1912, decided on 12th January 1915, from the order of Dist. Judge, North Arcot, in Appeal Suit No. 415 of 1911.

(a) Transfer of Property Act (4 of 1882), S. 82—Mortgage of two properties—Mortgagee releasing one of higher value for half mortgage debt—Mortgagee is entitled to realise balance from the other property and not compelled to take proportionately—cases discussed.

Where properties of unequal value belonging to two owners were mortgaged to secure a single debt and the mortgagee, on receiving one half of the mortgage amount from one of the mortgagors released his portion of the mortgaged properties, which were of higher value, and sought to realise the balance of the mortgage amount from the remaining properties belonging to the other mortgagor ;

Held, that he was entitled to do so and that the suit properties were liable to be sold for the whole of the balance remaining due upon the mortgage and not only to contribute rateably towards the mortgage-debt. 29 Mad. 217 ; 6 I. C. 842 dist. ; 31 Mad. 333 ; 23 Cal. 563 ; 11 Cal. 258 ; 18 Cal. 320 ; 33 Cal. 613 ; 31 Cal. 57 (P.C.) ref. to. 28 All. 174 (F. B.) 35 All. 441, Foll. [P. 230, C. 2.]

(b) Practice—Court—(Per Napier, J.) Court not competent to introduce provisions not contemplated by an act.

Per *Napier, J.*—A Court should not introduce such provisions as the Legislature has not thought fit to incorporate in Transfer of Property Act. [P. 233, C. 1.]

L. A. Govindaraghava Aiyar—for Appellant.

V. V. Srinivasa Aiyangar—for Respondent.

Facts.—The suit arose out of a mortgage executed by Arunachala Mudali and Sanjeevi Mudali for Rs. 1,800. The properties belonging both to Arunchala and Sanjeevi were comprised in the mortgage ; the properties of Arunachala being of a higher value than those of Sanjeevi. In 1910, Arunachala paid one-half of the amount then due on the mortgage and the mortgagee released his properties from the mortgage. Sanjeevi having died in the meanwhile, the mortgagee instituted the present suit against the daughter-in-law of Sanjeevi for the recovery of the balance of the mortgage amount by the sale of the properties of Sanjeevi alone. Arunachala was not made a party to this suit. The defendant mainly contended that the suit properties were only liable to contribute rateably towards the mortgage debt and that as the properties mortgaged were worth Rs. 5,550 and as the suit properties alone were only worth Rs. 1,020 she was only liable to pay a sum of Rs. 450 as and for her share of the mortgage-debt. Both the lower Courts upheld this contention. The plaintiff appealed.

Spencer, J.—In this case the separate properties of two owners were mortgaged to secure a single debt of Rs. 1,800. One of the mortgagors, Arunachala Mudali, paid up Rs. 1,631-14-0 and the mortgagee sought in this suit to recover the whole of the balance from mortgaged properties in the possession of the other mortgagor. The lower Courts refused to allow the plaintiff to recover more than what the property he proceeded against was rateably liable for.

The questions for our decision are, (1) whether there was in law an extinguishment of the mortgagee's lien over Arunachala Mudali's property, so as to preclude the plaintiff from recovering the whole of the balance due under the mortgage in this suit and the defendant from obtaining a contribution from Arunachala Mudali in a separate suit in proportion to the value his property bears to the whole debt secured by the mortgage, after deducting the amount already paid to the mortgagee ; (2) whether assuming that it was understood by the parties that plaintiff released his right to proceed against Arunachala Mudali's property, this will prevent him from recovering the whole debt from the defendant. The statement in paragraph 6 of the plaint that Arunachala Mudali cleared off a portion of the interest and principal due upon the mortgage and that accordingly his properties have been *excluded from the suit* as arranged, does not in my opinion amount to an extinguishment of the mortgage lien over Arunachala Mudali's property.

No doubt there are words in Exhibit B showing that plaintiff at one time had an idea of relinquishing his lien over Arunachala Mudali's property, but as it was not completed transaction and the document contains an admittedly false recital as to the payment of Rs. 1,621 in cash, it cannot affect the equities existing bet-

ween the parties. Exhibit B, therefore, does not help the defendant as containing an admission of plaintiff that he had given up Arunachala Mudali's property. I consider the alleged extinguishment not proved, but as this is partly a question of fact upon which one of the lower Courts had pronounced in defendant's favour, I proceed to the second question.

Now as stated in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (1). "It is a firmally settled doctrine that, as between the original parties, the release of a part of premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt." There are no words in S. 67 of the Transfer of Property Act to limit the mortgagee's right in this respect. S. 82 declared: "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." The effect of this and other sections relating to mortgages has been fully considered in *Krishna Aiyar* v. *Muthukumaraswamiya Pillai* (2), where it was held that there was nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. Reliance is placed by respondent's Vakil upon the *obiter dictum* at page 224: "It remains only to observe that, if the action of the mortgagee had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for." The learned Judges were here dealing with an argument advanced on behalf of subsequent purchasers. The decision in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (3) is also one relating to the rights of assignees of the equity of redemption. As observed by the Calcutta High Court in *Mir Esuf Ali Haji* v. *Panchanan Chatterjee* (1) 'the principle has no application as between the mortgagor and the mortgagee when the rights of no other person intervene and require protection." The decision in *Sanwale Singh* v. *Ganeshi Lal* (4) is to the same effect. I express no opinion as to the rights of subsequent transferees with or without notice. It was not necessary to join Arunachala Mudali as a party to this suit and there has been no application to have him made a party. He is not a person interested in the property which is the subject of this suit. Vide *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* (2) and *Ponnusami Mudaliar* v. *Sreenivasa Naicken* (3).

I consider for these reasons that the appeal should be allowed and that the appellant should be given a decree for sale of the plaint-mentioned properties for the whole of the balance due upon this mortgage with interest up to the date fixed for payment, and that he should recover his costs from the respondent throughout.

Time six months from this date.

Napier, J.—Two questions are raised in this appeal: *First*, whether the plaintiff has in fact extinguished the liability on the property of Arunachala Mudali under his mortgage; and, *secondly*, whether, if he has in fact done so, he is only entitled to recover a rateable proportion of the mortgage amount from the mortgaged properties in the possession of the defendant. The original liability arose on a simple mortgage executed on the 9th March 1898 by Arunachala Mudali and Sanjeeva Mudali, the father-in-law of the defendant (the mortgage amount being Rs. 1,800) with interest at 12 annas per cent. per mensem. Both executants mortgaged distinct items of the property belonging to each of them to cover the joint debt, and it is admitted that Arunachala Mudali, one of the original mortgagors, paid a sum of Rs. 1,631-14-0 in August 1910, which amount represented half the then existing liability. The plaintiff then brought a suit to recover the balance against the defendant and not making the co-mortgagor a party defendant, alleging that, in

(1) (1910) 6 I.C. 842.
(2) (1906) 29 Mad. 217.
(3) (1908) 31 Mad. 333.
(4) (1913) 35 All. 441 = 20 I.C. 41.

consequence of his having paid a sum of Rs. 1,631-14-0 to the plaintiff, he and his property out of the hypotheca were excluded from the suit, as was arranged with him. The defendant set up in paragraph No. 10 of the written statement that she was not liable for this balance of Rs. 1,600, as the plaintiff was bound to apportion the mortgage amount rateably on the value of all the mortgaged properties, and, as Arunachalla Mudali's properties were worth Rs. 5,550 and her property only Rs. 1,020, she was only liable for an amount of Rs. 450 as her share. The issue framed on this plea is: "Whether the plaint properties are liable to be sold only for a rateable amount due, as the plaintiff has exonerated the other mortgagor and his properties." The District Munsif held in favour of the defendant on this issue.

On appeal to the District Court two points were taken, *first*, that the lower Court had erred in holding that the non-inclusion of Arunachala Mudali, the co-mortgagor, and his properties operated as an extinguishment of the mortgage to that extent: and, *secondly*, that the plaintiff was entitled to recover his debt on any portion of the mortgaged properties. Before the District Court the first point seems hardly to have been pressed: for the learned Judge states that the only question argued in this appeal related to the second point, it having been assumed that the plaintiff had exonerated the other mortgagor and his properties.

A long and careful argument has been addressed to us by Mr. Govindaraghava Aiyar urging that the plaintiff did not intend, by the language used in his plaint, to allege that he had exonerated the other mortgagor and his properties. I am unable to accept this contention. It is clear to me from the language of the plaint that the parties went to trial on this footing and, seeing that there can be an oral release, I accept the finding of both Courts that there had been such a release and that the endorsement on Exhibit A of the payment is evidence of that release.

Assuming, therefore, that the plaintiff had discharged one of the mortgagors from liability under the mortgage by receipt of half the amount due, the question remains whether he is thereby debarred from seeking to recover more than a rateable proportion of the balance from the co-mortgagor. Both Courts have held that he is so debarred, relying on the language of *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* (2) and also on the *dictum* of Mookerjee, J., in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (1). The language used by the learned Judges on page 224 is as follows:—"It remains only to observe," etc. It is to be noted that in the view of the learned Judges the limitation of the mortgagee's rights arises where his action has had the effect of relieving the discharged property from its liability to bear its proportion of the debt; and the argument addressed to us is based on the assumption that S. 82 of the Transfer of Property Act, which creates the right to contribution, does not apply where one of the mortgaged properties has, at the time of the suit, been discharged from liability. The words are: "Where several properties are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt." It is argued that the words "are mortgaged" mean "are. at the date of suit, liable on an existing mortgage," and that they cannot be read as meaning "where several properties have been mortgaged to secure one debt the right to contribution arises" and that, therefore, the mortgagee having put it out of the power of one mortgagor to get contribution, an equity arises in favour of the remaining mortgagor which limits the mortgagee's right to rateable contribution. It is, to my mind, a little difficult to see how a mortgage can be extinguished so as to prevent contribution but be kept alive for the purpose of ascertaining rateable proportion. But I do not think it necessary to decide here whether the right of contribution has, in fact, been lost. That question may arise in another suit. I am unable, however, to accept the view that even if it is lost, this right of equitable limitation exists. It seems to me that we should be very slow in introducing equities into the statutory mortgage law of this country, based on equitable doctrines applied to English mortgagors. The right of contribution is itself an equity, and an equity specifically introduced by Statute. If, under the English Law of mortgages, there is an equitable limitation to the mortgagee's right, it was perfectly open to the framers of the Act to introduce

that equity by suitable provision. They have not chosen to do so and in my humble opinion, it is not the function of the Courts to do so for them. The learned Judges in *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* (2) examine the provisions of the Transfer of Property Act with great minuteness. They point out that there are only 4 or 5 sections which need be considered, namely, Ss. 56, 81, 82, 95 and 60 and conclude as follows:—"It is scarcely necessary to say that there is nothing in any of these sections suggesting the view that as between a mortgagee in the position of the plaintiff and holders of the equity of redemption, such as the appellants are, the law compels the former to distribute his debt, upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded against." S. 81 deals with marshalling; S. 82 is the contribution section. S. 95 creates a charge by a co-mortgagor, who has redeemed the whole debt, on the share of the other co-mortgagors in the property for their due proportion; S. 60 states the rights of a mortgagor to redeem: S. 56 gives a right to a purchaser of one of two properties subject to a common charge, as against the seller, to have the charge satisfied out of the other property as far as such property will extend. It is to be noted that Ss. 56, 81, 82 and 95 are statutory equities in favour of persons owning properties liable to a charge against other persons and other properties equally liable on that charge. It has not been argued, and it cannot be argued, that any of these provisions raises the equity sought for here. The first difficulty in the way of this equity seems to me to be this. If the equity can be used as a defence to a mortgage suit, it obviously should be available to a mortgagor in a redemption suit; for it is illogical to say that the mortgagee cannot claim more than a rateable proportion, but that the mortgagor in a suit to redeem would have to pay the whole amount. Therefore, the right must be exercisable in redemption. Unfortunately, however, the Transfer of Property Act is definite in negativing this right. S. 60 gives a right to the mortgagor to redeem *on payment of the mortgage money* and specifically provides that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of the proportionate amount of the money remaining due on the mortgage, except where a mortgagee has acquired another such share. Here is to be found the only statutory limitation to the liability of the mortgagor to pay the whole amount due on the mortgage, if he seeks to redeem. S. 67 states the rights of the mortgagee. It gives a right to a foreclosure, or an order for sale, to the mortgagee as long as the mortgage money has not been paid. Among all the following sections from 69 to 84 there is not a single provision limiting the right of the mortgagee to recover the amount of his mortgage from any property made liable thereto by the mortgage document, except where he has lost his priority by fraud, misrepresentation or gross neglect, and except as to the right of a second mortgagee without notice of a former mortgagee to have the securities marshalled so as to protect himself as far as possible. It is clear, threfore, that this equitable limitation of the mortgagee's right is one which is directly opposed to the language of various sections, introduces a right in the mortgagor impliedly negatived by S. 60, and is, of course, in direct conflict with the rights and liabilities arising from the language of the document. When I am asked to read this equity into the statute and am pressed with the language used by the learned Judges of this Court and of other Courts, I can only refer to the language of Lord Macnaughten in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (5), adopting the language of Lord Herschell in the *Bank of England* v. *Vagliano* (6) which is in effect as follows, that the proper course is to examine the language of the Statute—uninfluenced by any considerations derived from the previous state of the law. If the Statute is intended to embody in a Code a particular branch of the law, the purpose of such Statute surely was that the law should be ascertained by interpreting the language used and not by enquiring how the law previously stood. Bearing in mind that the Chapter relating to mortgages in the Transfer of Property Act is as distinctly

(5) (1896) 23 Cal. 563=23 I. A 18 (P. C.).
(6) (1891) App. Cas. 107

a "Code" as any enactment could be, in that it begins by defining a mortgage, and seeing that its provisions contain several equities known to English Law I must, with the greatest deference to the views taken by the other Judges, decline to introduce provisions which the Legislature has not thought fit to incorporate in the Act.

I now proceed to consider the question from another point of view. The mortgage is a simple mortgage, under which each of the mortgagors bound himself personally to pay the mortgage money. Under S. 68 of the Transfer of Property Act, the mortgagee has a right to sue the mortgagor *for the mortgage money* where the mortgagor has bound himself to re-pay the same. There is no equitable limitation here and a reference to the Contract Act shows that no such limitation can be introduced. S. 43 of the Indian Contract Act provides that any one of joint promisors may be compelled to perform the whole of the promise and S. 44 specifically enacts that where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor. This is the very point under consideration in this case and it is to be noted that these two S. 43 and 44 give the right of contribution to joint promisors and also specifically provide that the release of a joint promisor by the promisee does not free such promisor from responsibility to the other joint promisors. I fail to see how it can be argued that a mortgagee in a mortgage suit can only ask for sale of mortgaged property for a rateable proportion of the mortgage debt, when on his claim on the covenant to pay he is entitled to judgment for the whole amount with, as a necessary corollary, a right to levy execution against the land. If there is an equity here, it operates strangely, for its only result will be, not to protect the mortgagor, but to give some advantage to a subsequent mortgagee, if there be one.

Reliance is placed on the view embodied in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (3). There the learned Judges accept the statement of the law contained in Mr. Ghose's "Law of Mortgages," dated 1875, prior to the Transfer of Property Act. With the very greatest deference, I cannot follow the Court in disposing of the case without reference to the provisions of the Act, but this case does not help the respondent as the proposition stated is covered by Ss. 56 and 81 of the Act. The learned Judges in *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* (2), the case containing the *obiter dictum* relied on by the lower Court, quote with approval two cases, *Lala Dilawar Sahai* v. *Dewan Bolakiram* (7) and *Roghu Nath Pershad* v. *Harlal Sadhu* (8), which lay down that the mortgagee is entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants, though they limit it in a manner expressly provided by S. 81. The decision in *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* (2) was considered by the High Court of Allahabad in a later case reported as *Sanwale Singh* v. *Ganeshi Lal* (4) and the Court adopted as correct the broad proposition, without any reservation, that where two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property; and the proposition is stated equally broadly by a Full Bench of the same Court in an earlier case, *Sheo Tahal Ojha* v. *Sheodan Rai* (9). It is true that a different view appears to have been taken by the High Court of Calcutta in *Imam Ali* v. *Baij Nath Ram Sahu* (10). But there the learned Judges were considering the case of an assignee of the equity of redemption, a case which is covered by S. 56 of the Act, and no authority on the construction of any section of the Act is quoted for the proposition stated on page 622 that "a mortgagee, who has a security upon two or more properties, which, he knows, belong to different persons, cannot release his lien upon the one so as to increase the burden upon the others, without the privity and consent of the persons affected." With the greatest deference, I know of nothing in the Act to support this limitation and it is to be noted that in a later case reported as *Mir Esuff Ali Haji* v.

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(7) (1885) 11 Cal. 258.
(8) (1891) 18 Cal. 320.
(9) (1906) 28 All. 174 (F. B.).
(10) (1906) 33 Cal. 613.

Panchanan Chatterjee (1). Mr. Justice Mookerjee, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgaged premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release.

Nothing could be more definite then the following language used by that learned Judge in this last case :—

"It is a firmly settled doctrine that, as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (*vide* page 647)."

In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act, no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights, and I would refer the language used by Lord Davey in *Webb* v. *Macpherson* (11) with reference to an endeavour to apply English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English vendor's lien "was a creation of the Court of Equity, and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge.....Such a charge, therefore, stands in quite a different position from a vendor's lien. You have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute."

What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the Statute, apart from equitable principles introduced by Courts of Chancery in England.

For the above reasons I would reverse the decision of the lower Courts and make a preliminary order for sale as prayed for in the plaint.

S.N./R.K.

Appeal allowed.

(11) (1904) 31 Cal. 57=30 I. A. 238 (P. C.)

A. I. R. 1916 Madras 234

SPENCER AND SESHAGIRI AIYAR, JJ.

In re *Singri Bhima* and *others*—Prisoners—Appellants.

Criminal Appeal No. 689 of 1914, decided on 23rd February 1915, against the Order of Bellary Sessions Judge, in Case No. 70 of 1914.

Registration Act (16 of 1908), S. 82—Identity by similarity of thumb impression is sufficient for conviction under S. 82 if other evidence supports it.

The identity of a person as the executant or presenter of a document for registration though not conclusively proved by similarity of the thumb impression taken at the time of presentation, is sufficient for conviction when supported also by other evidence in the case. 32 Cal. 759 ; 1 C. L. J. 385, Foll. [P. 235, C. 1.]

K. Pandalai—for Appellants.

R. M. Palat—for Government.

Spencer, J.—It has been argued that the evidence of prosecution witness No. 3, that the finger print on the forged document is by comparison that of first accused, by itself is not sufficient to prove that none else could have made a similar impression and to convict him of the offence.

Is think in this case, it is sufficient. There can be no doubt that prosecution witness No. 3 was an experienced expert and although he mentioned only six points of similarity in the finger points which he compared, it must not be concluded that he could not have mentioned others if he had been asked to do so. Moreover prosecution witness No. 4 says, he saw first accused at the time of the execution and although he was not positive as to his identity, his evidence may be taken as reducing the possibility of error. The chances of another man having lines like the accused living in that locality (for villagers are not likely to have gone for a field to find a substitute for the supposed executant) are so infinites mal that in my opinion the Court was justified in acting on the supposition that the first accused was identical with the person who put his mark as executant of Exhibit A. *Secondly*, it is urged that the offence, if any, committed by the accused was not forgery, as the mark which he put did not denote the execution of the document but its presentation for registration. We alter the conviction accord-

ingly to one under S. 82 of the Registration Act, and retain the sentence already imposed.

Against the third accused there is the evidence of prosecution witnesses Nos. 4 and 6, which we think was rightly believed. Prosecution witness No. 4 also speaks to the presence of accused No. 2 at the execution and to his having put forward the first accused as Sugappa. The suggestion that this witness having as his *purohit* a relation of prosecution witness No. 7 is likely to have been influenced to get up a false case against a *protege* of third accused, depends on an allegation as to past enmity which we consider unsubstantial and remote. The document was in this accused's favour and it is unlikely that it could have been got up by others merely in order to get these accused into trouble.

We confirm the convictions with the modification above referred to in the case of first accused and dismiss the appeals.

Seshagiri Aiyar, J.—I do not wish to differ from my learned colleague who has had considerable experience regarding the value to be attached to the proof of thumb impression. At the same time I wish to state that I share the doubts of the learned Judges who decided *Emperor* v. *Abdul Hamid* (1) and *Panchu Mandal* v. *Emperor* (2), that it is not safe to convict an accused on the bare proof of identity of thumb impressions. Sir Edward Henry points out that two out of four persons will have one distinguishing mark of the impression in common. In the present case six such marks are spoken to by the expert whose credentials seem to be strong for giving evidence on the subject. Applying Sir Edward Henry's test, there will be two persons from out of 46 men who will have all the six marks in common, that is to say, out of 4,096 persons, two persons would possess the marks spoken to by the expert. Having regard to the fact that suspicion rested on the first accused and that he was complained against, I am not prepared to say that the evidence is not sufficient to convict the accused. No motive for implicating him falsely has been alleged against the complainant. I agree with my learned brother that the case against second and third accused has been fully made out.

S.N./R.K.

Appeal dismissed ; Convictions affirmed.

(1) (1905) 32 Cal. 759.
(2) (1905) 1 C. L. .J 385.

A. I. R. 1916 Madras 235

AYLING AND TYABJI, JJ.

Muthuswami Nadan and *another*—Plaintiffs—Appellants.

v.

A. A. K. Sankaralingam Chetty—Defendant—Respondent.

Second Appeal No. 1010 of 1913, decided on 5th August 1915 from the decree of Sub-Judge, Ramnad, in Appeal Suit No. 527 of 1912.

Contract Act (9 of 1872), Ss. 251 and 163—Authoriry of ex-partner to acknowledge partnership debt will not be presumed—Authority will be presumed when he is authorised to collect and pay debts—Limitation Act (1908), S. 19.

In the absence of express evidence of authority, an acknowledgment of a partnership debt by an *ex*-partner, after the dissolution of partnership, is not binding on any *ex*-partner other than the one making it. Where, however, an *ex*-partner is authorised to collect the outstandings and pay all the debts of the partnership, such authority includes the lessor power of acknowledging debts. [P. 236, C. 1 & P. 237, C. 2.]

B. Sitarama Rau—for Appellants.

C. V. Ananthakrishna Aiyar and *P. S. Vaidyanatha Aiyar*—for Respondent.

Judgment.—The only question for decision in this appeal is, whether the acknowledgment of liability by the 1st defendant on 27th May 1909 is binding on the 2nd defendant. The original liability was admittedly incurred on account of a partnership between the 1st and 2nd defendants ; but this partnership had ceased in 1906. It has been held in two cases in this Court, *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and *Sheik Mohideen Sahib* v. *Official Assignee of Madras* (2), that a part-payment or acknowledgment by one partner of a going concern will not bind another partner (so as to save limitation) in the absence of evidence of authorisation. Mere proof of the partnership would not be sufficient. In a more recent case, *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3),

(1) (1909) 32 Mad. 421=2 I. C. 309.
(2) (1912) 35 Mad. 142=11 I. C. 332.
(3) A. I. R. 1914 Mad. 609=21 I. C. 634=37 Mad. 146.

Wallis, J., expresses doubts of the correctness of these rulings, and appears to hold that authorisation might be presumed from the ordinary course of partnership business. But, however this may be, such a presumption could hardly be drawn in the case of an acknowledgment made after the dissolution of partnership. In such a case, it seems to us clear that express evidence of authority must be forthcoming, if the acknowledgment is to be held binding on any *ex*-partner, except the one who made it. The presumption which Wallis, J., would draw in the case of existing partnerships could not be applied to a case like the present.

It was argued before us that such evidence was forthcoming in the deposition of the 2nd defendant himself. This runs as follows :—

" After we separated, I did not authorise the 1st defendant to sign promissory notes for settlement of accounts on behalf of me also.....

" *Cross-examination* :—The 1st defendant said that the assets and liabilities could not be divided then and there, that he would himself collect outstandings and pay off liabilities and that we may divide the balance. I agreed to this.....

" *Re-examination* :—.....I then allowed the 1st defendant to collect outstandings and pay off creditors but did not authorise him to renew liabilities."

Regarding this evidence, the Subordinate Judge simply remarks that no authorisation to acknowledge debts is to be found in it. We must understand him to mean that although he does not disbelieve the evidence in so far as it favours the plaintiffs (which he could hardly do, seeing it is that of the 2nd defendant himself), he does not find anything in it which, if accepted, would amount to an authority to acknowledge liability. The appellants' Vakil argues that he has overlooked the principle enunciated in Story on Agency, paragraph 138, and quoted with approval in *Kondamodalu Linga Reddi* v. *Alluri Sarvarayudu* (4), that " where an agent is authorised to pay money for work done for his principal, or where he is referred to, to settle and adjust any account or business, his admissions of the existence of the debt, and of its validity, will be sufficient to take the case out of the Statute of Limitations. "

We do not think the Subordinate Judge has weighed the evidence from this point of view and we feel constrained to call for a finding on the following.

Issue ;—

" Was the first defendant expressly or impliedly authorised by the 2nd defendant at the time of dissolution of the partnership, or afterwards, to acknowledge liability for the outstanding debts of the firm ? "

The finding should be submitted within six weeks from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Ramnad submitted the following.

Finding.—In this appeal I am called upon to submit a finding upon the following issue :—

" Was the 1st defendant expressly or impliedly authorised by the 2nd defendant at the time of the dissolution of partnership, or afterwards to acknowledge liability for the outstanding debts of the firm ? "

2. The burden of proving this issue lies on plaintiffs, and the only evidence upon which reliance is placed is that of 2nd defendant. In the judgment of the High Court in which a finding is called for, it is stated that in the case of an acknowledgment made by one partner after dissolution of partnership, " *express evidence of authority* must be forthcoming, if the acknowledgment is to be held binding on any *ex*-partner, except the one who made it. " Reading the evidence of the 2nd defendant, I do not find in it any *express authority* given by him to first defendant to acknowledge debts. In his examination-in-chief he clearly says that he did not authorise the 1st defendant to sign pro-notes or settlement of accounts on behalf of him also. In cross-examination, he says that he agreed to 1st defendant's proposal to collect outstandings and pay off liabilities. Even here he does not appear to have been asked, and certainly does not say, that 1st defendant wanted authority to acknowledge debts and that he agreed to his doing so. And in re-examination he

(4) (1911) 34 Mad. 221=6 I.C. 407.

expressly says that he did not authorise him to renew liabilities.

3. There is, therefore, to use the words of their Lordships found in the judgment calling for a finding, no "express evidence of authority."

4. I am called upon to weigh the evidence from the point of view laid down in the following passage : "Where an agent is authorised to pay money for work done for his principal or where he is referred to settle and adjust any account or business, his admissions of the existence of the debt, and of its validity, will be sufficient to take the case out of the Statute of Limitation."

5. I understand this passage to mean that authority to settle and adjust any account or business implies an authority to acknowledge debts. Even if such be the case, such an authority cannot be implied from 2nd defendant's statement in cross-examination to the effect that he agreed to 1st defendant's proposal that he should "himself collect outstandings and pay off liabilities." The 2nd defendant never agreed to 1st defendant *settling and adjusting any account or business;* he simply agreed to his collecting outstandings and paying off liabilities. And from an authority to collect outstandings and pay off liabilities, a power to acknowledge liabilities cannot be implied. It may be otherwise if a general power to settle and adjust a business is given, but such is not the case here. I may also state that no case of agency was set out in the plaint, and that 2nd defendant was sought to be bound by 1st defendant's acknowledgment, as they were partners.

6. That 2nd defendant would not have given 1st defendant a general authority to settle and adjust account is apparent from the fact that under the award, Exhibit II, both the partners are to collect the outstandings and pay off the debts.

7. I, therefore, find the issue in the negative.

[The second appeal came on for final hearing after the return of the finding on 5th August 1915.]

Judgment.—We cannot accept the finding of the Subordinate Judge, who does not appear to have properly appreciated the remarks in our order calling for it.

He does not reject the evidence to the effect that the 1st defendant was authorised to pay outstanding debts of the firm : and we can find no support for Mr. Ananthakrishna Aiyar's suggestion that he found this authority to be limited by the amount of collections. There is nothing to indicate that this aggregate of debts paid and acknowledged exceeded the aggregate of collections of assets.

We must, therefore, take it as proved that the 1st defendant was authorised to pay all debts ; and from this, the lesser power of acknowledging debts is to be inferred.

We modify the decree of the lower Appellate Court by declaring the 2nd defendant also liable for the decree amount. The 2nd defendant will bear the plaintiffs' (appellants') costs in this second appeal.

S.N./R.K.

Decree modified.

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SANKARAN NAIR AND OLDFIELD, JJ.

Rao Rama Rao and *another*—Plaintiffs—Appellants.

v.

Narasimha Nayanini Varu and *others*—Defendants—Respondents.

First Appeal No. 1 of 1913, decided on 8th February 1915, against the decree of Dist., Judge, North Arcot, in Original Suit No. 41 of 1910.

(a) Hindu Law—Adoption—Widow—Consent of undivided and not of divided members is essential.

Where a Hindu dies issueless leaving behind him divided and undivided brothers, the consent necessary to enable his widow to adopt a son to him must be obtained from the undivided members of the family, that of the divided brothers being immaterial. [P. 238, C. 1,]

(b) Hindu Law—Adoption—Widow—Consent—In absence of consent by managing member or majority of co-parceners adoption is invalid—Where adoption after 30 years with object of alienating property—Refusal of consent is not improper.

Where the managing member refuses his consent and the widow does not obtain the consent of the majority of the co-parceners, an adoption made by her is invalid. A managing member cannot be said to have acted from improper motives if he declines to sanction an adoption

made, after long delay of nearly 30 years, to enable the widow to alienate the property outside the family. [P. 239, C. 1.[

L. A. Govindaraghava Iyer—for Appellants.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—The question for decision is whether the 1st plaintiff is the adopted son of the deceased Lakshimipathi Nayanini Varu.

Lakshimipathi died about 30 years ago. His widow, the 2nd plaintiff, adopted the 1st plaintiff on 2nd November 1908. The District Judge finds that she failed to obtain the consent of Venkatramana Rao and Venkata Rao, two *sapindas* of the deceased, who were divided from him. He finds further that the 1st defendant, who was the undivided brother of the deceased and who admittedly refused to give his consent to the adoption, did not withhold it from improper motives. He also holds that the 2nd defendant, who gave his consent in writing (Exhibit B), did so probably on accounts of some misrepresentation and that the 3rd defendant never gave his consent. He was, therefore, of opinion that the adoption was invalid. All these findings are disputed in appeal.

In the absence of any authority from her husband, the 2nd plaintiff was bound to obtain the consent of the *sapindas*. As her husband died a member of an undivided family, the requisite authority must be obtained from the members of that undivided family. The question, therefore, whether she obtained the consent of Venkata Rao and Venkataramana Rao, is immaterial. We have also no hesitation in holding that the Judge has arrived at the right conclusion. We think the Judge is also right in deciding that the 3rd defendant did not give his consent and that the letter (Exhibit A) alleged to be written by him is not proved. The story told by the plaintiffs' witness No. 9 of his having gone to the house of the 3rd defendant where he found one Subbiah writing a letter, which was afterwards signed by the 3rd defendant, who told the witness, when he was asked what the letter was about, that "he was writing about an adoption to be made" by the 2nd plaintiff is improbable. The 3rd defendant (defendant's witness No. 1 denies that he gave his consent or wrote the letter, Exhibit A. He admits, however, that plaintiff's witness No. 2 asked him to give his consent which he refused. He was not asked to state his reason.

The 2nd defendant gave his consent (Exhibit B). We are unable to find that there was any misrepresentation There is no evidence in support of that plea. The evidence of the 1st defendant and of his 2nd witness proves that the plaintiff's witness No. 2, the son-in-law of the 2nd plaintiff, wanted the 1st defendant to give her Rs. 10,000, as the maintenance which she was receiving was inadequate and she wanted to make some provision for her daughter and grand-children. It was also alleged that the 1st defendant had appropriated her jewels. The 1st defendant denied the appropriation and offered to pay Rs. 6,000 to the 2nd plaintiff, which she declined. Some months afterwards she sought his consent to the adoption which was refused. Thereupon she made this adoption in accordance with an arrangement with the natural father of the 1st plaintiff, the adopted boy, under which she was to get absolutely one-fourth of her husband's property. There is little doubt, therefore, that she made the adoption to get some property for herself to give to her daughter and grand-children.

It is contended on behalf of the respondent that the consent of all the co-parceners, the first defendant and his sons, the 2nd and 3rd, is necessary to validate the adoption and reliance is placed on the observation of the Judicial Committee in the *Ramnad* case (1) that it would be unjust to allow the widow to defeat the interest of the brothers of the deceased husband by introducing a new co-parcener against their will. Reference is also made to the Travancore judgment, *Ramasami Iyer* v. *Bhagati Ammal* (2), which has apparently received the approval of the Judicial Committee in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishore* (3). It is also urged that the widow's motive was improper and that consent was rightly refused. On the other hand, it is urged that all that the co-parceners are entitled to consider

(1) (1864-65) 2 M. H. C. R. 206.
(2) 8 Mad. Jur. 58.
(3) (1876-78) 1 Mad. 69=32 A 154 (P.C.).

is whether the widow proposes to make the adoption in the proper and *bona fide* performance of the religious duty of substituting an heir by adoption to her deceased husband, and once the expediency or propriety of an adoption is established, the motive operating on the mind of the widow in making an adoption is immaterial, and no weight should be attached to the defendant's refusal on improper grounds to consent to an adoption.

We think it unnecessary to decide the questions.

It may be that in an undivided family the consent of the manager, to whom the regulation of all the concerns of the family is delegated by law or by the members, may be sufficient to validate an adoption. See *Sri Virada Pratapa Raghunadha Deo* v *Sri Brozo Kishoro* (3), Mr. Justice Bashyam Aiyangar was apparently of that opinion. *Subrahmanyam* v. *Venkamma* (4). In the case before us the 1st defendant, the managing member, has refused his consent. Nor has the 2nd plaintiff obtained the consent of the majority of the co-parceners, which in certain circumstances might be binding on the joint family. It is only the 2nd defendant who has given his consent. Whether the 3rd defendant gave any reason or not does not appear. The 1st defendant cannot be said to have acted from improper motives in declining to sanction an adoption made after long delay to enable the widow to alienate the property outside the family. We agree with the Judge, therefore, that the adoption was made without the requisite authority. We dismiss the appeal with costs. The appellant will pay to Government the Court-fee payable on the appeal memorandum.

S. N./R. K.

Appeal dismissed.

(4) (1903) 26 Mad. 627.

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SADASIVA AIYAR AND NAPIER, JJ.

Rukmani Sundarammal—Plaintiff—Appellant.

v.

Muthammal and *others*—Defendants—Respondents.

Second Appeal No. 1574 of 1912, decided on 21st October, 1914, from the decree of Dist., Judge, Chingleput, in Appeal Suit No. 225 of 1909.

Minor—Alienation by guardian—When sale by guardian to be set aside pointed out—Question depends upon quantom of consideration for minor's benefit—If benefit small sale be set aside on minor's paying the amount—No partition decree between alienee and minor be passed even if sale held valid.

If in a suit by a minor to recover possession of the properties alienated by his guardian, it is proved that a substantial portion of the purchase-money was not required for the minor's interests or benefit, the whole sale should be set aside on condition of the minor paying to the purchaser the remaining portion, but if a very substantial portion of the purchase-money was utilised for purposes binding on the minor, the sale should be upheld and the minor given a decree for recovery of the small portion of the purchase-money not utilised for his benefit. 18 I. C. 27 and A. I. R. 1915 Mad. 93, Foll. [P. 240, C. 2.]

In such a case there can be no decree for partition between an alienee and a minor who has attained full age in respect of land sold by the guardian of the minor. [P. 242, C. 1.]

L. A. Govindaraghava Aiyar — for Appellant.

T. R. Krishnaswamy Aiyar, for *T. R. Ramachandra Aiyar*—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is a widow who was still a minor when this suit was brought by her next friend in the year 1907. Her father as guardian sold certain properties for Rs. 1,425 about 3½ months before this suit was brought, that is on the 25th January 1907. The sale was made to the 3rd defendant. The suit was for the recovery of possession of the properties so sold to the 3rd defendant as well as certain other properties. In this second appeal, we are only concerned with the properties sold to the 3rd defendant. The plaintiff is the appellant in this second appeal.

The lower Appellate Court found that the plaintiff's father had no necessity to sell the entire properties, *i.e.*, 4 acres of wet land and 4 acres of dry land, and that the sale of the said properties was not beneficial to the minor's interests. The District Judge's findings are (*a*) that only Rs. 680 was required to discharge the antecedent debts left by the minor's husband and to meet the plaintiff's husband's sister's marriage expenses, (*b*) that a sale of one-half of the properties mentioned in Exhibit I would have been sufficient to meet those necessities. On the above findings the sale under Exhibit I was set aside as regards one-half

of the properties sold under it. The learned District Judge gave the following directions in his decree in addition to the provisions in the decree of the District Munsif : (*a*) The plaintiff do recover from the defendants one-half of the lands sold by the plaintiff's father to the 3rd defendant under Exhibit I (excluding item I of the B schedule which, though included in the sale-deed, was stated by the 3rd defendant to have been included in his sale-deed by mistake and which was decreed wholly to the plaintiff by the District Munsif ; (*b*) that the plaintiff be declared liable to pay maintenance to the 1st defendant ; (*c*) that the division of the lands into two shares do take effect in June and July 1907, and (*d*) that the mesne profits be determined at the time of execution.

The contentions urged before us by Mr. L. A. Govindaraghava Aiyar for the plaintiff are (1) that the lower Court erred in its declaration as regards the plaintiff's liability to grant maintenance to the 1st defendant as the question did not arise for consideration in the present suit, (2) that on the view of the lower Appellate Court that only a portion of the consideration for Exhibit I was required in the interest of the minor plaintiff, the lower Appellate Court ought to have only directed the re-payment of the same to the 3rd defendant but ought not to have upheld the sale as regards one-half of the properties.

The first contention is clearly right, as the questions whether the 1st defendant was entitled to claim maintenance from the plaintiff, the extent of that claim and whether it has been already satisfied either wholly or in part—these questions have nothing to do with the present suit which was brought by the plaintiff as her husband's heir for possession of the properties illegally enjoyed by the defendants.

As regards the other contention, the respondent's learned Vakil has been unable to refer us to any precedent in support of the course taken by the District Judge, namely, the setting aside of a sale-deed executed by a minor's guardian so far as a portion of the properties contained in such sale-deed is concerned, upholding the sale as regards the other portion contained in the same sale-deed. In *Kaliappa Gounden* v. *Deivasigamani Pillai* (1) Benson and Sundara Aiyar, JJ. held that, where a minor whose lands were sold for Rs. 850 benefited only to the extent of Rs. 300 by the sale, the sale should be set aside in its entirety and the minor should be decreed possession of the property conditionally on his paying the Rs. 300 to the purchaser. In *Thalagara Rammanne* v. *Kalagare Gangayya* (2), Miller and Tyabji, JJ., held that where a sale effected under two conveyances for Rs. 1,300 by a Hindu widow was supported by necessity to the extent of Rs. 1,022, the purchaser was entitled to retain the lands conveyed under both sale-deeds, directing him however to pay the reversioners the balance of Rs. 278 with interest at 6 per cent. per annum from the date of the death of the widow. It will be seen from these and similar precedents that according to the circumstances, the relief granted to the plaintiff takes either of two shapes, namely, either the whole sale complained of is set aside, on condition of the plaintiff's paying to the purchaser that portion of the purchase-money which was utilised for purposes binding on the plaintiff, or the plaintiff, while refused the relief of setting aside the sale, is given a decree for that portion of the purchase-money which was not utilised for his benefit. Where a substantial portion of the purchase-money was not required for the plaintiff's interests or benefit, tne whole sale is set aside on condition of the plaintiff's paying to the purchaser the remaining portion. Where however, a very substantial portion of the purchase-money was utilised for purposes binding on the plaintiff, the sale is upheld, but the plaintiff is given a decree for recovery of the small portion of the purchase-money not utilised for his benefit.

In the present case, the learned District Judge finds that only Rs. 680 of the Rs. 1,425 mentioned in Exhibit I as the purchase-money was required and utilised for purposes beneficial to or binding on the plaintiff. In arriving at the figure Rs. 680, the District Judge seems to have committed a slight arithmetical error, into which he was apparently led by the admission of the plaintiff's own Vakil who argued the case before the District Judge. In paragraph 3 of his judgment the learned District Judge says that Rs. 1,425 is made up of (1) a debt of Rs. 160 to the Town Bank, (2) a debt of Rs. 125 to one Venkatarama Sastri, (3) Rs. 220 for the expenses of the forth-coming marriage of the sister of

(1) (1913) 18 I C. 27.

(2) A. I. R. 1915 Mad. 93=26 I. C. 178.

the plaintiff's husband and (4) Rs. 415 said to be due on accounts to the 2nd defendant, and he professes to take these four figures from the consideration portion of the sale-deed Exhibit I (besides a sum of Rs. 525 for which a pronote was executed). But turning to that consideration portion, I find that it is not Rs. 220, but only Rs. 200, which is mentioned as required for the expenses of the forthcoming marriage of the sister of the plaintiff's husband The lower Appellate Court makes up this Rs. 680 evidently thus: (1) due to the Town Bank Rs. 160, (2) due to one Venkatarama Sastri Rs. 125, (3) required for marriage expenses Rs. 220 and (4) due to 2nd defendant on accounts (Rs. 415 the figure arrived at on the accounts *minus* Rs. 231 barred) Rs. 184. Total Rs. 689 or roughly Rs. 680. If we substitute Rs. 200 for Rs. 220, the correct figure is Rs. 669. The 1st to 3rd respondents in their memorandum of objections contend that the lower Appellate Court's finding that only Rs. 184 of the sum of Rs. 415 was not barred by limitation is erroneous.

I think this contention is sound. Rupees 415 is the sum due on the accounts only after deducting Rs. 93 given up by the 2nd defendant, husband of the 3rd defendant. The arbitrator's award shows that Rs. 508 is the real sum due on the accounts and that Rs. 415 is arrived at after deducting the Rs. 93 given up by the 2nd defendant. The Rs. 231 barred by limitation is a part of this total sum of Rs. 508 and not merely a part of the balance of Rs. 415 arrived at by deducting Rs. 93 out of Rs. 508. The plaintiff gave up Rs. 93, therefore, out of the whole Rs. 508 and hence the sum due to him on the acconnts excluding what is barred by limitation, is Rs. 508 *minus* Rs. 231 or Rs. 277, and not Rs. 415 *minus* Rs. 231 or Rs. 184 only. Hence the correct amount is Rs. 160 *plus* Rs. 125 *plus* Rs. 277 or Rs. 762 and not merely Rs. 680 or Rs. 669.

It appears from the evidence that the balance of the purchase-money (Rs. 1,425 *minus* 762 *i. e.*, Rs. 663) was not even paid in cash by the 2nd and 3rd defendants to the plaintiff's guardian, but a pro-note seems to have been executed for Rs. 525 to him. I do not think that in these circumstances the purchaser is entitled to have the sale confirmed. But I think that the sale should be wholly set aside on condition of plaintiff's paying Rs. 762 within three months (to be paid to the 2nd and 3rd defendants).

As regards the memorandum of objections, it embodies three conditions: (1) that the whole sale to the 3rd defendant should be upheld in its entirety, (2) that not only Rs. 184 but Rs. 277 should be held to be the sum due under the accounts even excluding the Rs. 231 barred, (3) that as an arbitrator has held that Rs. 415 was due on the accounts, the lower Courts should have held that Rs. 415 was so due even though Rs. 142 (Rs. 231 *minus* Rs. 93) out of the said Rs. 415 was barred by limitation.

For the reasons already given, I think that the whole sale should be set aside and hence the first contention could not be allowed. The second contention must be upheld As regards the third contention, the only matter referred to arbitration was what sum was due on the accounts *as they stood* and not what sum was *legally* due by the plaintiff to the 3rd defendant on the accounts. The arbitrator refused to go into the question of the bar of limitation and he deducted Rs. 93 out of Rs. 508, not because it was part of the sum of Rs. 231 barred by limitation, but because the 2nd defendant gave it up at the time of Exhibit I.

In the result, in supersession of the lower Court's decree the plaintiff will be given a decree (1) for possession unconditionally of item 1 in the B schedule, (2) for possession of the other items in the B schedule on condition that she pays into Court within three months from this date the sum of Rs. 762 to be paid to the defendants Nos. 2 and 4, (3) that on her becoming so entitled to possession she be also given a supplemental decree for mesne profits, after due inquiry from the date of payment of Rs. 762 into Court till delivery in execution, from the defendants Nos. 2 and 3 as regards lands other than item 1, (4) that she get mesne profits from the 5th defendant on item 1 for the period claimed in the plaint to be determined by a supplemental decree, (5) that the 5th defendant do pay proportionate costs in the District Munsiff's Court to the plaintiff as found in the District Munsiff's decree and (6) that plaintiff do bear her own costs in other respects as also

defendants Nos. 2 and 3. It is declared that in the pro-note for Rs. 525 standing in plaintiff's father's name, plaintiff has no interest whatever.

Napier, J.—I entirely concur in my learned brothers' view that there can be no decree for partition between an alienee and a minor who was attained full age, in respect of land sold by the guardian of the minor. There is not a trace of the exercise of such a jurisdiction by the Court of Chancery nor in the two decisions of the Privy Council *Hanoomanpersaud Panday* v. *Musammat Babooee Munraj Koonwaree* (3) and *Lalla Bun seedhur* v. *Kunwar Bindeseree Dutt Singh* (4). In the latter case the Board laid down that where there is an innocent purchaser, the Court exercising equitable jurisdiction may withhold its hand (in which case, of course, the remedy of the minor would be against the guardian), but "where the alienee has failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that the transaction was for the benfit of the estate, then the instrument cannot be supported." The only remaining question is, on what terms is the Court to intervene in the minor's favour? In the case above quoted the Board decided that restoring the property to the respondent on the terms of paying to the appellent what may be justly due to him was a more equitable course than what was proposed in that case on behalf of the alienee. I take that in the view of the Board that is the proper method. In this case it is obvious that an alienee who in respect of part of the purchase-money gave personal security instead of cash cannot have thought that the transaction was for the benefit of the estate. The lower Appellat Court has found that Rs. 680 out of the Rs. 1,425 was required and utilised for purposes binding on the minor. There is no finding that any larger sum could be allowed on the ground that the alienee had good reason for believing it to be required, and in fact not much more could be claimed as Rs. 680 added to Rs. 525, the amount of the promissory-note, is Rs. 1,205 as against the total consideration of Rs. 1,425. Speaking for myself I should accept the figure of Rs. 680, but my learned brother has seen his way to go into the question of the correctness of the figures and though I have doubts whether we have any jurisdiction to do anything of the sort [*vide* the decision of the Privy Council in *Ravi Veeraraghavulu* v. *Sri Raja Bomma Devara Venkata Narasimha Naidu Bahadur* (5)]. I will not differ from him and I, therefore, concur in the decree set out in the judgment just delivered.

S.N./R.K.

Appeal allowed.

(3) (1854-57) 6 M.I.A. 393=18 W.R. 81 (P.C.).

(4) (1863-66) 10 M.I.A. 454=19 E. R. 1044 (P.C.).

(5) A. I. R. 1914 (P. C.) 87=25 I. C. 305=37 Mad. 443.

A. I. R. 1916 Madras 242

SPENCER, COUTTS-TROTTER AND NAPIER, JJ.

V. S. Venkata Subbiah Chetty—Plaintiff—Appellant.

v.

A Subba Naidu and others—Defendants—Respondents.

Letters Patent Appeal No. 101 of 1913, decided on 20th August, 1915, from the Judgment of C. J. and Oldfield, J., dated 16th September, 1913, in Original Side Appl. No. 44 of 1912.

(a) Deed construction—Surrounding circumstances must be looked to—Important clause should not be nullified.

A Court is empowered to look to surrounding circumstances in deciding what the intention of the parties to a particular transaction was. [P. 244, C. 2.]

Parties are bound by the words they have used, however clear their intention may be. [P. 246, C. 1.]

In construing a document, a Court will not adopt such a construction as will reduce one important clause of it to a nullity. (*Ut res magisvaleat quam pereat.*) [P. 247, C. 2.]

(b) Evidence Act (1 of 1872), S. 115—On notice of assignment debtor consenting to deliver moneys—He cannot subsequently contend existence of charge in his own favour, no notice having been given.

Where there is an assignment of moneys in the hands of a debtor and the debtor communicates to the assignee his assent to deliver the moneys in accordance with the terms of the assignment, he cannot afterwards assert, as against the assignee, any claim or charge in his own right, of which no notice had been given to the assignee.

Walker v. *Rostron*, 9 M. & W. 411; *Griffin* v. *Weatherby*, 3 Q. B. 753; *Macfarlane* v. *Lister*, 57 L.J. Ch. 92, Foll. *Liversidge* v. *Broadbent*, (1859) 4 H. & N. 603; ref. to. [P. 246, C. 1.]

Quære.—Whether this obligation is based on contract, estoppel, or waiver? [P. 246, C. 1.]

(c) Transfer of Property Act (4 of 1882), S. 132—Assignee takes subject to all equities—It is his duty to enquire—Burden of proving assignment is free from any right is on assignee.

Under S. 132 of the Transfer of Property Act, the assignee of an actionable claim *prima facie* takes it subject to all existing equities and it is his duty to ascertain their extent. [P. 246, C. 2.]

Mangles v. *Dixon*, (1852) 3 H. L. C. 702; Hall & Tw. 542; ref. to.

The onus of proving affirmatively that the assignment of an actionable claim is free from an existing right, is upon the assignee. [P. 246, C. 2.]

(d) Deed—Construction—Words 'without prejudice, explained'.

The words 'without prejudice' when used in private documents, have not the well-known meaning which they have when used in connection with an actual or impending litigation. [P. 246, C. 2.]

T. Rangachariar and *A. Suryanarayaniah*—for Appellant.

D. Chamier and *K. Pandalai* for *Short, Bewes & Co.*—for Respondents.

Judgment.—This was an action brought by a merchant in Cuddapah, called Venkata Subbiah Chetty, against two persons, who may for brevity be called the "Naidus," the South Indian Export Company and Heinrich Brandt. The facts giving rise to the action are as follows:—

The Naidus were the owners of some mica mines in Nellore. On the 17th of February 1906, they entered into an agreement, Exhibit I, with the South Indian Export Company regarding the working of the mines and disposal of the produce. The general nature of the agreement was that the Company should receive the produce of the mines and sell it, should receive a commission on the gross amounts realized by sale and certain specified disbursements incurred in connection therewith. They were further to give the owners a standing advance of Rs. 55,000, and were to receive on that sum and on any further sums they might advance, interest at 6 per cent. (Clause 5). It was provided by clause 11 that the Company should first pay the commission, interest and disbursements due to themselves out of the realized proceeds of the mica sales, then pay various creditors of the Naidus in certain proportions and hand the balance, if any, to the Naidus. Clause 12 provided that the Company should, subject to clause 11, have a lien on all cash and mica in their hands as security for the repayment of all sums which might fall due under the agreement. The agreement was to continue to be in force for five years from 1st of March 1906, and all moneys due to the Company, including the standing advance of Rs. 55,000, were to be paid off and discharged not later than two months before the expiration of the agreement, *i.e.*, by the 1st of January 1911.

The agreement duly came into force, and under it quantities of mica were sold and payments made by the Company to the various creditors of the Naidus, including the plaintiff. Meanwhile the Naidus were being pressed by the plaintiff for further security and a further share of the proceeds of the mines. He had apparently obtained decrees against them to an amount exceeding a lakh of rupees. In these circumstances the Naidus entered into an arrangement with the plaintiff, which is set out in a letter dated the 20th of November 1908 (Exhibit E). The material part of that letter is as follows:—

"We undertake that all the mica produced in our mines at Kalichedu and Tellabodu will be delivered only through the South Indian Export Company; and that the net sale-proceeds after deducting their commission will be paid to you only by the said Company. In confirmation of this our undertaking, we have this day caused the Manager, South Indian Export Company, to give you an undertaking that the sale-proceeds will be paid to you by him as aforesaid. We hereby agree and give you a lien on the mica now in our hands and future mica from the above said mines till the above said amounts are fully repaid."

On the same date the Naidus wrote to the South Indian Export Company a letter (Exhibit A1) which contains the following passage:

"We request you to give an undertaking to Venkata Subbiah Chetty that you will pay him from time to time the net sale-proceeds, after deducting your commission of all the mica produced in our mines at Kalichedu and Tellabodu that we shall deliver through you as per agreement between ourselves."

On the following day, the 21st of November, the South Indian Export Company wrote to the plaintiff a letter (Exhibit A) in these terms:

"We have received a letter from Messrs. Subba Naidu and Kondappa Naidu, dated the 20th November, copy

of which we enclose for your information. The contents of this letter have been duly noted by us and the instructions given therein, will be carried out as occasion arises."

Enclosed with this letter was a copy of the Naidus' letter of the 20th November to the Company (Exhibit A1) and both documents were headed "without prejudice."

It will be observed that, whereas the agreement of the 17th February 1906 enabled the Company to deduct their commission, disbursements and interest in the first instance out of the sale-proceeds of the mica, Exhibit A is a direction to the Company to pay the net sale-proceeds after deducting commission only, without any mention of disbursements or interest. It seems quite clear in the light of what happened subsequently that 'commission' was in fact used as a compendious term to include interest and disbursements as well, and that neither the Company nor the Naidus, who were parties to the agreement of February 1906, nor the plaintiff, who was also acquainted with it noticed the variation in phraseology. It has been suggested in this Court that we ought to suppose that the parties deliberately and with intention altered the rights of the Company under the agreement of February 1906 by this correspondence, and that we may assume that some forbearance on the part of the plaintiff in pursuing his remedies against the Naidus was the inducement offered to the Company for giving up their right of priority in payment of interest and disbursements. There is no trace of anything of the sort in any of the documents, and no evidence to that effect was sought to be given at the trial. Mr. Simson, the Managing Director of the Company, was examined as a witness, and even although it was not directly in issue it is almost impossible to believe that he would not have been asked some question about it if any such tripartite arrangement had taken place. In accordance with the instructions contained in the letter of 20th November 1908 (Exhibit A1), the Company proceeded to remit the balance of the proceeds of the Kalichedu and Tellabodu mica to the plaintiff. It is not in evidence what deductions they made from it in respect of their own charges. But again it is difficult to believe that, if they had in fact discontinued the deduction of interest and disbursements, that fact would not have been brought out at the trial. Their interpretation of what their rights were, would not, of course, determine them, but it is an element in the history of the case. While we are on this point, we may say that we do not share the doubt expressed by one of the learned Judges who heard the first appeal as to our power to look to surrounding circumstances in deciding what the intention of the parties was [See *River Wear Commissioners* v. *Adamson* (1)].

All went well until June 1909, when the Company received instructions from the Naidus to deliver the proceeds of certain cases of mica to one Ramachandra Chetty. They at once by a letter of the 24th of June (*vide* Exhibit B) notified the plaintiff of these instructions ; and on the 26th of June Mr. Ramachandra Raju, the plaintiff's then Vakil, answered by a letter (Exhibit F) of that date protesting against the proposed delivery to Ramachandra Chetty, informing the Company that the proposal was an unlawful one and demanding delivery of the sale-proceeds to the plaintiff. The Company, thereupon, communicated with the Naidus, who informed them [*vide* Exhibit H] (1) that the 37 cases of mica did not come from Kalichedu or Tellabodu ; and (2) that the plaintiff had broken his contract with the Naidus and consequently absolved them from the further carrying out of the arrangement of 1908. In fact both these statements proved to be untrue, though doubtless the Company had not then the means of knowing their falsity. At any rate, on the 16th of July, by a letter of that date (Exhibit J), the Company informed the plaintiff that they had been instructed that the mica did not come from Kalichedu or Tellabodu, and that they were, therefore, about to deliver to Ramachandra Chetty. This brought the matter to a head, and, after some further correspondence, the plaintiff instituted this suit, joining as defendants, the two Naidus and the South Indian Export Company as the 3rd defendant. The plaintiff in his plaint sent out the effect of the correspondence of November 1908, claimed specific performance 'of the contract evidenced by'

(1) (1877) 2 A. C. 743.

that correspondence, and payment to him of the net sale-proceeds of the 36 cases of mica. The Company then applied to the Court to have Heinrich Brandt, the 4th defendant, added to the suit on the ground that he, as secured creditor of the Naidus, had claims against the proceeds of the mica, which might conflict with the claims of the plaintiff. They also filed a written statement in which they set out the provisions of the agreement of February 1906, and asserted their claim to deduct interest, commission and disbursements under that agreement and disclaimed any interest in the balance, asking only to be protected against the rival claims of the plaintiff and the Naidus and the 4th defendant (*vide* paragraphs Nos. 11, 13 and 16). Subsequently the claim of the 4th defendant was in some manner satisfied and withdrawn; and an application was made to Bakewell, J., by the defendant Company to amend their written statement. Leave was given and certain amendments were made. It was strenuously argued by Mr. Rangachariar on behalf of the plaintiff that this leave ought never to have been given and that the amendments should be disregarded, on the ground that until the amendments were made the defendant Company had only taken up the position of stake-holders, and that on the withdrawal of the 4th defendant from the suit, they ceased, on their own showing, to have any defence and that they ought not, after the action had been pending for a considerable time, to be allowed for the first time to resist the plaintiff's claim on any other ground than the presence of rival claimants. If it were the fact that the defendant Company had conceded the plaintiff's claim as now formulated, except as subject to the claims of the 4th defendant, this contention would have great force. But it is not the fact that the defendant Company ever submitted to the claim ultimately made by the plaintiff in this action. The claim made in the plaint appears on examination to be one thing, the submission in the defence another, the claim being for the net proceeds less commission only, the submission being to pay the net proceeds less not only commission but interest and disbursements as well. We very much doubt whether the parties or their Pleaders had at this time realized this discrepancy, or whether any question as to the nature or extent of the deductions was present to the mind of the plaintiff at the time that the suit was filed. But whether the parties had realized it or not, there it was on the pleadings and it is not correct to say that the amendment allowed, enabled the defendant Company to resist the claim finally made, that they were not entitled to deduct disbursements and interest. What the amendment did effect was to enable the Company to claim for the first time an alleged lien on the mica and its proceeds by reason of the termination, reached during the pendency of the suit, of the agreement of February 1906. All sums repayable under that agreement had fallen due on the 1st of January 1911, including the standing advance of Rs. 55,000; and if their lien was valid, the debt in respect of which it was exercised would be increased by at least Rs. 55,000 as from that date. This was a claim, good or bad, which the Company could not have made in their original written statement, and it cannot be seriously pressed that we ought to interfere with the discretion of the learned Judge allowing the amendment which raised it.

A long discussion took place in the argument before us as to whether the present action was maintainable at all. Mr. Chamier contended on behalf of the defendant Company that there was no contract between the defendant Company and the plaintiff and, assuming that to be established, there was no contract between the Naidus and the defendant Company on which the plaintiff could sue. Mr. Rangachariar for the plaintiff, while resisting those propositions, further contended that the point was not open to the defendant Company, as it was not raised in the pleadings and that the first additional issue settled by Sankaran Nair, J., after the 3rd defendant had amended his written statement, implied the existence of a valid contract between the plaintiff and the defendant Company. It is no doubt a strong thing to allow the defendant to take a point which does not appear in the pleadings and the issues, and both the trial Judge, Wallis, J., and the Bench before whom this appeal was originally heard, refused to allow them to do so. This, however, is a very exceptional case, because, in our opinion, it is reasonably clear that, at the time of the drafting of the pleadings and the first settlement of issues, certainly the defendant Company and probably the plaintiff, and their respective advisers, had not grasped the extent of the plaintiff's ultimate claim. However, in the view we take of this case, it is not necessary to decide the point whether it is open to the

defendant Company or not, or whether either of the alleged contracts were made. There was—and this is not disputed—at any rate a valid assignment in favour of the plaintiff, and the real question is, what, on the true construction of the documents, was it that passed by the assignment ?

It seems to be clear law that where there is an assignment of moneys in the hands of a debtor and the debtor communicates to the assignee his assent to deliver the moneys in accordance with the terms of the assignment, he cannot afterwards assert, as against the assignee, any claim or charge in his own right, of which he has given the assignee no notice. It is not quite clear from the authorities whether this obligation is based upon contract, estoppel or waiver, but the existence of the obligation is clearly recognised in the English authorities both before and after the Judicature Act. See *Walker* v. *Rostron* (2) and *Griffin* v. *Weatherby* (3). These cases are not altogether easy to reconcile with *Liversidge* v. *Broadbent* (4). But the decision in *Macfarlane* v. *Lister* (5) seems quite unequivocal.

It seems reasonably clear that the simple word 'commission', used in Exhibit A 1, to describe deductions to be made by the defendant Company, was used *per incuriam* ; and that there was no intention to cut down the defendant Company's right under the agreement of February 1906. Moreover, as has been pointed out, it was not until the action was well started that the discrepancy between the language of the assignment and the agreement was discovered. Similar inaccuracies occur elsewhere in the correspondence. For instance, in Exhibits B, D, F and G, "the proceeds of the mica" is used where what was meant was 'the net proceeds after deduction (even on the plaintiff's own showing) of the commission fees.' However clear the intention of the parties may be, they are bound by the words they have used, and it is impossible to say that commission means commission *plus* something else. If, therefore, there were nothing to qualify or amplify the word 'commission' in Exhibit A1, or in the defendant Company's adoption of it in Exhibit A, we should be constrained to hold that the defendant Company had given away their right to interest and disbursements. It is to be observed that by S. 132 of the Transfer of Property Act, the assignee *prima facie* takes subject to all existing equities. It is the duty of the assignee to ascertain the extent of the existing equities [Vide *Mangles* v. *Dixon* (6)] and where there is an existing right, the onus will be upon the assignee to show affirmatively that the assigment to him was free of it. We have come to the conclusion that Exhibits A and A1, when carefully examined, do not amount to an assignment free from the claims of the defendant Company to interest and disbursements. In the first place Exhibit A1 speaks of the mica as being "delivered as per agreement between ourselves." That clearly informed the plaintiff that mica was being delivered in accordance with a contract subsisting between the Naidus and the defendant Company. It is in evidence that the plaintiff was cognizant of the terms of that contract under which indeed he took a direct benefit (See clause 11—II). It must, we think, be taken that this brought to his knowledge the fact that there was an agreement under which the defendant Company had a right to deduct interest and disbursements as well as commission. The business purpose of Exhibit A was to inform the plaintiff that in future the proceeds of the Kalichedu and Tellabodu mines would go to him in their entirety after they left the defendant Company's hands and not to the Naidus and further, would not be depleted by prior payments to other creditors of the Naidus. Still, again, though that may have been the business object of the letter, if it really purported to cut down the Company's rights, the plaintiff is entitled to take advantage of that.

Finally, both to Exhibit A and Exhibit A1 the Company prefixed the words "without prejudice." When used in connection with actual or impending litigation, these words have a well-known meaning which is quite inapplicable to their use in these documents. On the other hand it is a strong thing to treat them, as the plaintiff desires us to treat them, as unmeaning and of no effect. The writer undoubtedly meant something by the phrase, and if what he meant could or ought to have been understood by the recipient, we must give effect to it. We know what the writer meant, because he said what he meant in the

(2) (1842) M. &. W. 411.
(3) (1842-43) 3 Q. B. 753.
(4) (1859) 28 L. J. Ex. 232.
(5) (1888) 37 Ch. D. 88.

(6) (1852) 3 H. L. C. 702.

witness-box. The question was probably inadmissible, but it was put and answered without objection. He said that he 'meant without prejudice to the Company's rights under the agreement of 1906.' The question is, did the plaintiff know, or ought he to have known, what Mr. Simson meant? We think that the proper inference is, he ought, and did. He had in Exhibit A1 a clear reference to the agreement of 1906, of whose terms he was cognizant before. And after all, this interpretation seems to us to be in accordance with the ordinary and natural meaning of the words. It is quite true that when a man makes an offer "without prejudice," the effect is to prohibit the reading of the letter if the offer is not accepted. But the actual meaning of the words in such a case is this: "I am making an offer which I do not admit I am bound to make; and I make it without prejudice to my existing legal rights." In other words, "you shall not use this letter as an admission that I owe what I offer." So here we think that "without prejudice" meant 'without prejudice to the Company's existing legal rights,' that is, to their rights under the agreement of 1906, to which express reference was made in Exhibit A1. There is in fact no offer, only a notice that they were aware of a certain assignment, and an assurance that the instructions would be given effect to without prejudice to their own rights and without binding themselves to any course in future. That is, in our view, the effect of the letter.

This disposes of the main point in the appeal; for Mr. Rangachariar concedes that, if the defendant Company's claim to deduct interest and disbursements is good, no enquiry is necessary to ascertain whether the proceeds of the 36 cases of mica will be exhausted thereby. But the further question was decided by the learned trial Judge, and is before us, as to whether, as after 1st January 1911, the defendant Company were entitled to exercise a lien on the goods for their advances which then became repayable, as well as for interest and disbursements. As we have held that the plaintiff took subject to the defendant Company's rights under the agreement of 1906, it follows that he took subject to any lien created by that agreement; and reliance is placed on clause 12 as creating such a lien. Mr. Rangachariar in effect argues that no lien at all was created by that instrument. He says that the lien created by that clause was in terms subject to clause 11 and clause 11 obliged the defendant Company to pay all current balance after satisfying certain claims to the owners, the Naidus. A Court will not readily adopt a construction that reduces one important clause of an agreement to a nullity; and where a man professes by his contract to give a lien to another, any reasonable construction will be adopted to give effect to it: *ut res magis valeat quam pereat.* A perfectly natural construction gives effect to both clauses; *viz.*, that the operation of the lien is subject to the discharge of all payments guaranteed to be made except those to the Naidus themselves; and that their right to receive the balance depended on there being no further increase under clause 5 of the standing loan of Rs. 55,000. We are, therefore, of opinion that the lien created by the agreement of February 1906 was valid and could be exercised in respect of the capital sums falling due from the Naidus to the Company. The right to enforce it against the proceeds of any particular consignment, might conceivably depend upon the facts as to that consignment; and the only consignment in question in these proceedings is that of the 36 cases of mica already referred to, with regard to which the question need not be considered on Mr. Rangachariar's admission. We understand that subsequent consignments with regard to which the question of the general lien will be important are the subject of another pending action. We, therefore, desire to guard ourselves against prejudging in any way the results of those proceedings.

One other contention requires to be noticed. Mr. Rangachariar contended that the lien which the Naidus purported to give the plaintiff by the concluding words of Exhibit E, was of such a nature that, as soon as they extracted any mica from the designated mines and put it in a deliverable condition, there was a specific appropriation of such mica to the purposes of the lien, passing a special property in it to the plaintiff. In support of this contention he cited *Maradugula Venkataratnam* v. *Kotala Ramanna* (7). It is more than doubtful whether in face of clause 12 of the agreement of February 1906 the lien purported to be given to the plaintiff was one which the Naidus could validly give. But be that as it may, it could obviously give no property in the mica as the arrangement

(7) (1911) 9 I. C. 255.

never contemplated that the mica should ever be handled by the plaintiff at any stage after it left the mine in a merchantable condition ; it was to be consigned for sale not to him, but to the defendant Company ; and even if the lien is to be treated as an assignment, the assignment to him was not of the proceeds in his own hands but in the hands of the defendant Company. In these circumstances, it is impossible to hold that there was at any time any appropriation of the mica to him.

The appeal fails and is dismissed with costs, certified for two Counsel.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 248.

AYLING AND TYABJI, JJ.

Moideensa Rowthen and *another*—Defendants—Appellants.

v.

Mahammad Kasim Rowthen—*(Plaintiff)* and *others*—Defendants—Respondents.

Second Appeal No. 14 of 1914, decided on 5th January 1915, against the decree of Sub-Judge, Negapatam, in Appeal Suit No. 732 of 1910.

Mahomadan Law—Co-heir—Suit by heir for share is not one for partial partition as in Hindus but in nature of administration.

Under Muhammadan Law the estate of a deceased person devolves on his death on his heirs, each of whom becomes entitled to his definite fraction of every part of the estate. Therefore a suit in which one heir claims to receive his share of the property of the deceased from another heir is not a suit for "partial partition." as understood in Hindu Law. Such a suit is legally maintainable though it ought, as a rule, to take the form of a suit for the administration of the estate of the deceased.

G. S. Ramachandra Aiyar—for Appellants.

S. Gopalaswami Aiyangar—for Respondents.

Judgment.—The only point argued before us is that in the suit, out of which the present appeal arises, all the property of the deceased Shaik Farid should be partitioned and that, therefore, the 1st and 2nd defendants (who are the appellants before us) should be given a share in the properties belonging to Shaik Farid in the hands of the 3rd defendant. This point was, however, not taken in the lower Courts. What the appellants contended there was that the suit should be dismissed altogether, on the ground that the plaintiff prayed for what has been referred to as partial partition. That expression, when applied to parties governed by Muhammadan Law, is misleading. In the case of Mussalmans what would be a partition suit, if the parties were Hindus, ought often to take the form of a suit for the administration of the estate of a deceased person. In the present case the suit would undoubtedly have been better framed, had it asked for administration; and had the appellants asked the lower Court, as they now ask, that the plaintiff's suit should be treated as such and that consequently one of the questions to be decided was what estate was left by the deceased, our decision might have been different or based on different grounds. But in the state of circumstances with which we have to deal we must only consider ·

(1) Whether the suit as framed by the plaintiff was maintainable.

(2) Whether the appellant's contention taken in second appeal for the first time ought to prevail, or whether the balance of convenience points against the appellants.

With reference to the first point, it need only be stated that under Muhammadan Law the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate. It is, therefore, futile to discrible a suit in which one heir claims to receive his share of the property of the deceased from another heir as a suit for partial partition and to say that, therefore, the suit is not maintainable. Both the terminology and the principles of the Hindu Law are in such a case inapplicable. This point must be kept distinct from the questions that may arise when an heir claims his share of the property of the deceased, and when he in reality ought to institute a suit for administration he asks for what is styled 'partial partition.' In such a case it would be a question for the Court whether in order to avoid multiplicity of suits the plea of any defendants ought not to be given effect to in order that the whole estate of the deceased should be administered and in due administration should be partitioned for once. But the question cannot permit of a hard and fast rule to govern all circum-

stances. It is enough for the present purposes to say that the suit as field was maintainable and that there was no consideration put forward by the 1st and 2nd defendants in the lower Courts which the lower Courts decided wrongly.

On the second point also we think the decision must be against the appellants. The stage at which they have taken up the only contention which they could take up with any reason, makes it necessary to consider whether there would be any useful purpose served in allowing matters in dispute to be raised and determined in the present proceedings, turning them into a number of suits of the same nature as the suits instituted by the plaintiff, or whether the 1st and 2nd defendants should be referred to a fresh suit in which the estate of the deceased should be completely administered. We are of opinion that the latter alternative would be more suitable.

The appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 249.

SANKARAN NAIR AND OLDFIELD, JJ.

Maharaja of Jeypore—Plaintiff—Appellant.

v.

Rukmini Pattamahadevi Garu—Defendant—Respondent.

First Appeal No. 50 of 1911, decided on 18th February 1915, against the decree of Agent to the Governor, Vizagapatam, in O. S. No. 2 of 1909.

(a) Landlord and Tenant—Dispossession—Nature of tenure—Forcible dispossession by *zemindar* does not change nature of tenure held by feudatory.

Where a *zemindar* wages war against his feudatory and forcibly seizes his estate, but, later on a descendant of the said feudatory gets back possession of the same, the intermediate possession of the *zemindar* does not affect the right of the feudatory and change the character of the tenure.

Vizianagaram Maharaja v. *Suryanarayana*, 9 Mad. 307, (P.C.) 1 Bom. 286; 7 W. R. 21 (P.C.); 9 Bom. 198; 9 Mad. 175; 27 Cal. 1004, Foll.
[P. 256, C. 2.]

(b) Madras Permanent Settlement Regulation (25 of 1802), S. 4—Words "Small quit rent" in *sanad* granted to *zemindar* meant favourable rent—"Alienated" included only permanent grants and not temporary lesses—Clause did not prohibit enhancement consented by lessee.

Where a *sanad* which was granted to a *zemindar* at the time of the Permanent Settlement contained the following clause: "Alienated lands, paying a small quit rent, which quit rent, unchangeable by you is included in the assets of your *zemindari*"; and where it was contended that under the above clause the *zemindar* was not entitled to enhance the rent of under-tenures granted by the *zemindar* prior to the said Permanent Settlement:

Held, that the words 'small quit-rent' in the above clause, which corresponded to S. 4 of the Madras Regulation XXV of 1802, meant a favourable rent; that only permanent grants should be understood as coming within the mischief of the word 'alienated' therein; that there was no warrant in authority or practice for applying it to mere temporary leases, not understood by parties to be permanent, however long their currency might be; and that the clause in question prohibited only enhancements imposed by the *zemindar* and not those to which the lessee consented. [P. 259, C. 1 & 2.]

(c) Landlord and Tenant—Forfeiture—Claim of permanent tenancy at fixed rent is no denial of title and does not work forfeiture.

A lessee does not repudiate the title of his landlord and incur forfeiture by describing his holding as independent and permanent at a fixed rent.

Kali Kishen Tagore v. *Golam Ali*, 13 Cal. 3; *Kali Krishna Tagore* v. *Golam Ally*, 13 Cal. 248; and *Unhamma Devi* v. *Vaikunta Hegde*, 17 Mad. 218; 3 M. L. J. 287, Foll.; 8 I. C. 546; A. I. R. 1915 Mad. 122, dist.

14 W. R. 28 (P. C.); 29 Mad. 52 (P. C.); ref. to. [P. 259, C. 2.]

(d) Grant—Resumption—When grant can be resumed stated—Grant for service and burdened with service is distinguished with reference to resumption—What is default in service to work forfeiture is explained.

A resumption of an estate is permitted to a *zemindar* only when the estate has been included in the assets of his *zemindari* at the Permanent Settlement and the grant is for service in lieu of wages (in which case the right of resumption is absolute), or is burdened with service (in which case the right can be exercised only if the grantee is unwilling to perform the service, even though the same might be obsolete or unnecessary).
[P. 260 C. 1.]

Where the obligations on the part of a tenant, the non-performance of which was alleged to give rise to the exercise of the right of resumption by the *zemindar*, were to attend (1) with 500 *paiks* at Dusserah, the occasion of the annual festival and Durbar and (2) whenever such attendance was directed, when the tenant went on Sircar business:

Held, that the attendance required was on indefinite and ceremonial occasions and could not be deemed a conditton of the holding, that it was at the most analogous to that of copyholders in England to do suit in the Court of their manor and that the default in question did not entail a forfeiture of the holding.
[P 260, C. 1 & P. 261, C. 2 & P. 262, C. 1 & 2.]

No forfeiture is incurred unless there is non-performance on the part of the tenant of a subsisting obligation for service and that service is connected with his title. [P. 263, C. 1.]

B. N. Sarma and *S. Srinivasa Iyengar*—for Appellant.

K. Srinivasa Aiyangar, *V. Ramesam* and *A. Krishnaswami Iyer*—for Respondent.

Oldfield, J.—This appeal relates to the claim of the Maharajah of Jeypore to eject the defendant, Thatraz of Bissemkatak, from that estate and to recover from him arrears of *kattubadi* and profits on the grounds that he has denied his liability to pay Rs. 15,000 annually and to render service and has defaulted in both respects in each year from October 1903, such payment and service being the tenure on which the estate is held. Defendant's contentions are that (1) he holds at a fixed *jama* of Rs. 2,200 only, (2) that the income of his estate was excluded from the assets of Jeypore for the purpose of the Permanent Settlement and that, therefore, his *jama* is not liable to enhancement, or his estate to resumption, and (3) he is bound to no service.

We refer to the Thatraz as defendant, though he died pending the suit, and his widow was impleaded in his place.

The Jeypore Maharajah owns a large *zemindari* of over 12,900 square miles extent, situated in the hill tracts of the Vizagapatam District, of which the Bissemkatak estate, measuring approximately 500 square miles, forms part. Those tracts came under the British Government at the Permanent Settlement in 1802. But for many years they were without local Courts, Magistracy or Police, being until 1839 under the Courts on the plains. By Act XXIV of 1839 they were placed for all purposes under the Agent to the Governor and were subject to the law, as represented by rules framed thereunder. Before 1863, however, there were, in fact, neither British Magistracy nor Police in Jeypore territory. During the greater part of the period from 1869, with which we are concerned, the country was, as the District Gaztteer shows, intermittently in a state of private war between Jeypore and its neighbour, Vizianagaram, or its feudatories, including defendant's predecessors. In these circumstances, the origin and development of titles would naturally be obscure and the evidence regarding them meagre and ambiguous. It is not, however, on that account permissible to treat the burden of proof, as it devolves on either party, as discharged, until a reasonable degree of certitude has been reached, or to refuse, to the prejudice of the one, to draw inferences from substantial defects in the evidence of the other.

The case for plaintiff is that Bissemkatak was settled and has always been treated as part of Jeypore, that early in the last century it was granted to one Ramachandra, great-great-grand-father of defendant, with the designation of Thatraz (lord of the army), in remunerarion for and for the continuance of his services, that it was resumed by Jeypore in 1816 and retained under direct management till after 1846, that Narandra, grandson of Ramachandra, having obtained possession by intriguing with the then Maharajah's son, accepted a lease on an obligation for service in respect of the provision of 700 *paiks* (men at arms) and for payment of Rs. 2,500 per annum, and that this payment was enhanced to Rs. 5,000 in 1864 and Rs. 15,000 in 1877, the number of *paiks* being then reduced to 500. During the minority of plaintiff and defendant, the Agent to the Governor in charge of their estates commuted the service temporarily for an annual payment of Rs. 1,500. In 1903, defendant, on attaining majority, refused to render the service and offered to pay only Rs. 2,200, repudiating further obligation by a letter, Exhibit BB, dated 26th November 1904.

It is not disputed that plaintiff must prove his right to resume, or that he can, in no circumstances, resume lands not included in the assets on which his *zemindari* was permanently settled. The first important question is, therefore, whether the Bissemkatak estate was among those assets. Defendant has attempted to meet plaintiff's evidence that it was so (1) directly and (2) by proof that the estate became his before the Permanent Settlement under a grant, Exhibit VI, dated 1689. In connection with the alleged history of this grant reference will be made to facts which bear also on the decision of the other questions before us, whether the claim to rent at a higher rate than Exhibit VI authorises is sustainable and whether the estate, having been included in the Settlement assets, fulfils the further conditions, entailing liability to resumption, which authority prescribes.

The evidence regarding the Permanent Settlement begins with the Circuit Committee's reports, Exhibits NN and NN1. The lower Court in its paragraph No. 33 refused to attach importance to these

accounts: and it may have been justified in doing so as regards matters of detail, as distinct from the principles followed. And the fact that they purport to bring the whole income of Bissemkatak into Settlement and make no reference to the restriction of Jeypore's receipt from it to the tribute of Rs. 2,200, for which defendant contends, is not without weight. No such objection, moreover, can be made to the next documents, Exhibits A and B, the *cowle* granted to Jeypore in 1795, and the *sanad*, which replaced it, dated 1803 but apparently delivered later. In them and the correspondence connected with the former, there is no sort of distinction made between Bissemkatak and the other divisions of the *zemindari*, which (it is not disputed) were included with their full incomes in the assets. The *sanad* embodied the Permanent Settlement. To the probability that the then Thatraz would have failed to plead Exhibit VI at it and obtain recognition of his independent status, we shall return. At present the point is that, all allowance made for the remoteness of these hill tracts and the lack of information available regarding them, those responsible in 1803, the Collector, the Special Committee and Government, are not likely to have excluded from Settlement the greater part of the income of a substantial estate, which they mentioned and of the circumstances of which they had some information (*vide* Exhibits VIII and IX), without being conscious of and referring to having done so. No doubt, as the lower Court observes, and Exhibits A1 and A8 show, the *peishkush* payable to Government was fixed arbitrarily and without direct reference to the income which Jeypore would receive. But it does not follow, and there is no general or special reason to be founded on the interest of either Government or the *zemindars* concerned, for supposing that the Settlement was, or was intended to be, incomplete or other than comprehensive of all assets in the settled tracts. Defendant does not suggest that any part of the income of his estate, other than that represented by his liability to Jeypore, was settled separately. The documents referred to are, in our opinion, sufficient to transfer the burden of proof from plaintiff on this point.

Defendant relies to discharge it, *first*, on the correspondence preliminary to the issue of Exhibit D, relating to the abolition of *sayer* or customs revenue in the tracts under Settlement. In Exhibit VIII, in 1802, Mr. Webb, the Collector, referred to Bissemkatak as held on a hereditary tenure by a proprietor, with whom it would be necessary to negotiate through Jeypore for the closure of a *chowky* or custom-house on its borders; and in Exhibit IX, 1803, his successor, Mr. Alexandar, described it as "not immediately under the management of Jeypore, but constituting a small separate *zemindari* held by the Thatraz." It does not, however, follow that the possession of a *chowky* by Bissemkatak involved its independence. For, it is clear from Exhibit VII that it was accountable for the *sayer* collected by it to Jeypore; and the meaning may well be that a revision of the agreement between it and Jeypore as to the collection would have to be arranged. Mr. Alexander had been Secretary to the Circuit Committee (Exhibit A3). But his experience as Collector had been short when Exhibit IX was written: and nothing therein entails his meaning that Bissemkatak was subject to a fixed tribute, or had independent assets over which Jeypore had no claim. If he, or Mr. Webb, had meant that, they must have gone on to do what no record suggests their contemplating and what was never done, settle with Bissemkatak on those assets independently. And in fact these letters strongly support plaintiff's case that the omission to make such a Settlement was intentional and was due to the fact that the Settlement with Jeypore was known to be comprehensive.

Further argument for a different intention has been based on the details of the account alleged to have been submitted with Exhibit IX, Exhibit B and VII series, when the Jeypore *peishkush*, fixed by Lord Hobart at Rs. 25,000, was reduced to Rs. 16,000 in consequence of the abolition of the *sayer*. In Exhibit IX, an attempt was made for the first time to deal with the actual income of the *zemindari*, Mr. Alexander estimating the hardship involved in the loss of the *sayer* revenue with reference to the actual income which Jeypore would receive after it, and arriving at that actual income by substituting for the income shown in Exhibit N, N1 from Bissemkatak and Gunupore *pergunnahs*, the only parts of the *zemindari* not under direct management, the actual fixed income therefrom,

Rs. 3,344 in the case of the former, thus excluding the farmer's profit. And defendant, therefore, argued that, in Mr. Alexander's opinion, only that actual income had been included in the assets on which the Settlement was made. Again, having thus estimated the Jeypore income, he reached his conclusion as to the effect of the abolition of the *sayer* by deducting from it the total *sayer* for the *zemindari* shown in Exhibit VIIb, less that derived from Bissemkatak and Gunupore ; and this also, it is said, involves that they were treated by him as independent estates, with which separate Settlement would be necessary.

One answer to the first of these arguments is that materials for it are not available, since it depends on the allegation that fixed income from Bissemkatak was Rs. 3,344 ; and that rests only on Mr. Alexander's statement in Exhibit IX, which is, as will appear, of questionable value, and on Exhibit VII*a*. This fixed income is material in connection also with defendant's argument in snpport of Exhibit VI, and it is, therefore, necessary to deal with Exdibit VII*a* closely. It is an unsigned account and is not referred to explicitly as an enclosure to Exhibit IX or elsewhere in the correspondence; and, though objection was taken to its admission in the lower Court, there is nothing regarding its history or origin. It accordingly differs from Exhibit VII which has in its favour the fact that the figures in it are repeated in, and were presumably the basis of, Exhibit B1, the enclosure to the report of the Board of Revenue to Government, Exhibit B. Both accounts, as their headings show, purport to have been furnished by the *lopayikari*, or subordinate *zemindar*, Samburaju. He may be identical with the Somanatha referred to at page 233, District Gazetteer. But, if so, his description of himself as *lopayikari*, not as Thatraz, is peculiar. Mr. Alexander, no doubt, in Exhibit IX referred only to the Thatrax, but the extent of his appreciation of the facts is doubtful. In the circumstances, plaintiff's explanation that the person in question, whether Somanath or some temporary renter, Samburaj, claimed no independent status, calls for consideration in this connection and in another to be referred to later. The heading of Exhibit VII*a* describes it as the *kham irusalnama* of Bissemkatak that is the gross remittence account, as *kham bhogatta* in the heading of Exhibit VII means gross demand account (*Vide* Wilson's Glossary). But the explanation for the differences between the figures in the two accounts for the same years, that Exhibit VII shows gross collections and remittances to the Bissemkatak Estate Treasury and Exhibit VII*a* the net remittances by Bissemkatak to Jeypore, is inconsistent with that interpretation of the former term. No explanation, moreover, has been offered for the reference to remissions in Exhibit VII*a*, in one year as much as Rs. 550, which are inconsistent with the theory that the Rs. 3,344, the figure on which defendant relies, was a fixed payment for land revenue and *sayer*. In these circumstances, we cannot act on Exhibit VII*a* as authentic, and the reference to Rs. 3,344, in Exhibit IX alone, is then insufficient ground for a conclusion.

For, to deal with the second objection to defendant's argument, scrutiny of Exhibit IX makes it doubtful whether Mr. Alexander wrote with any clear understanding of the facts ; and the disposal of the matter by the Board of Revenue and Government did not consist in any adoption of his proposals, or involve anything which can be regarded as security for the correctness of his statements. As regards the first point, in paragraph No. 7 of Exhibit IX, Mr. Alexander wrote as though the terms of the *sanad* to be granted were still open to discussion and referred to his attempts to obtain accounts in order to an estimate of the Jeypore and other *zemindaris*, as though accounts, to which he made no reference, had not already been obtained by the Circuit Committee. Yet, having obtained Exhibit VII and (in some way) the figure, Rs. 3,344, he made no attempt to propose a revised *peishkush* on the fresh facts available, but adopted that of Rs. 25,000 already fixed, as beyond controversy. Next, in his calculation, he overlooked the fact that the fixed payment of Rs. 3,344, retained by him in the Jeypore income, in fact included Rs. 1,115 on account of the *sayer*, then under abolition, which should have been excluded, if the calculation was to be correct; and he did so, although, if defendant's contention is valid, he had Exhibit VII series before him, in which the fixed payment for *sayer* is distinctly referred to. Lastly, he referred to Exhibit A, Lord Hobart's *cowle*, as promissing a deduction from the *peishkush* in consideration of the abolition of *sayer*, though it expressly negatived the right to one; and the explanation offered, that the

reference is really to an annual *cowle* in some year subsequent to 1794, is useless, since the issue of such a *cowle* rests only on defendant's own statement in Exhibit YY6 in 1904. When these objections to Exhibit IX are unrebutted, it is not possible to assume the competence of its author, or the accuracy of his other statements, including those relating to the fixed annual payment, or the independent *sayer* of Bissemkatak and Gunupore. And next, the lower Court erred in its statement that Mr. Alexander's proposals were adopted by higher authorities. He, first, in Exhibit IX, estimated the hardship to Jeypore, which the loss of the *sayer* would entail, and then proposed that a proportionate deduction from *peishkush* should be made. But the Board of Revenue, on whose report, Exhibit B, Government acted, did not follow him in either of these directions. For, it proposed no proportionate deduction from *peishkush*, but a deduction of Rs. 9,000, pretty evidently a round figure for Rs. 9,223, Mr. Alexander's estimate of actul collection for *sayer*; and, if it did follow him in adopting the latter figure and excluding the Bissemkatak and Gunupore *sayer* from it, it is probable that it did so from inadvertence, since its reference to the Collector's estimate is general and includes no mention of these two estates, or the necessity for a separate Settlement with them. Exhibit B in fact contains nothing, which entails or suggests that the portion of Mr. Alexander's report on which defendant relies, was or need have been treated as material in order to the disposal of the matter; and there is, therefore, no sufficient security for the correctness of his statements. The direct objection to plaintiff's case based on Exhibits VII and IX series must, therefore, be disallowed.

We turn *next* to defendant's claim that he holds the estate under a grant, Exhibit VI, dated 1689, his sole obligation being a payment of Rs. 2,200 per annum. The burden of proof of this grant is on him. Exhibit VI, the authenticity of which he must establish, is an inscribed copper plate; and we have not been shown that there is any intrinsic probability against its fabrication at a date later than that which it bears. Direct evidence of its origin is not to be expected, and defendant, therefore, relies on S. 90 of the Indian Evidence Act, that is on evidence of its production from proper custody in circumstances justifying the making of the presumption authorised by that provision. The custody of Exhibit VI was, it is certain, with Government from 1891, when it was given by defendant's witness No. 11 to the Special Assistant Agent, then in immediate charge under the Agent of Bissemkatak estate during defendant's minority, until it was restored to him after he attained majority in 1903. That custody, no doubt, might be held proper. But it is the only established fact in this part of the case; and we are not prepared to draw the necessary presumption with reference to it alone. We, therefore, deal with the circumstances in which the custody by Government is alleged to have originated.

They begin with the fact that in 1853 disputes between the predecessors of the parties as to the tenure of Bissemkatak reached a climax, and the Agent summoned them in order to a settlement. The then Thatraz, instead of appearing, sent the petition, Exhibit X, in which he complained of the aggressions of one of the Maharajah's subordinates, stated his own case and enclosed what is now alleged to have been a translation of Exhibit VI. On account of the absence of both parties no settlement was effected, the Agent merely recording his opinion that an attempt should be made to fix a proper sum as rent or *kattubadi* for Bissemkatak. It is now, however, alleged that Exhibit VI was actually produced before the Agent by a representatiye of the Thatraz for the purpose of the enquiry, who retained it after taking it back owing to a quarrel over his maste'r failure to give him land as remuneration for his services. That representative is said to have been Narayana Patnaik, father of Karunakar Patnaik, an estate employee, now deceased. 12th defendant's witness's evidence is that he received Exhibit VI and three account books from Karunakara for safe custody, when the latter anticipated a search of his house by the Special Assistant Agent, Mr. Elwin, in connection with a charge of malversation, but handed them over to defendant's witness No. 3, defendant's mother, who sent them by her brother, defendant's witness No. 12, to Mr. Elwin whilst he was at Bissemkatak.

This case teems with improbabilities and inconsistencies. It was first put forward in any detail in paragraph 17 of Exhibit YY6, a representation made by defendant to Government in 1904, and based according to defendant's witness No. 13, who prepared it, on information obtained from defendant's witness No. 3. But the story, as told

in Exhibit YY6, differs from that supported by Exhibit X series and that which defendant's witness No. 3 gave in evidence on the authority of her mother-in-law. For, Exhibit YY6, refers to the document as actually produced before and taken back from the Agent; the order on Exhibit X, Exhibit X*b*, implies that there was no inquiry at which evidence can be supposed to have been adduced; and defendant's witness No. 3 understood that Narayana Patnaik secreted Exhibit VI and did not produce it before the Agent at all. Next the identity of the agent employed by the Thatraz is uncertain. For the signatory of Exhibit X on his behalf was Narain Doss, and he cannot have been the same as Narain Patnaick, Doss being a Brahmin and Patnaik, a Sudra description. Again Exhibit QQQ shows that Narain Patnaik did receive land, service *inam* No. 10, from the Thatraz, and that Karunakara held it after him; and though this does not preclude his having quarrelled with his employer on the ground that the grant was insufficient, it and his and Karunakara's retention in service make it highly improbable that they were wrongfully retaining an essential estate record, which the Thatraz would naturally be eager to recover. Lastly, the details of the story as to the recovery of Exhibit VI before its surrender to Mr. Elwin are insufficiently supported. He, no doubt, has probably forgotten and could have given no evidence as to what he was told; and the letter sent by defendant's witness No. 3 with Exhibit VI has no doubt been destroyed. But of the three witnesses concerned, defendant's witnesses Nos. 3 and 11 are defendant's close relatives and defendant's witness No. 12 his low paid servants. The story is not probable. For Karunakara could have found many better ways of secreting Exhibit VI than depositing it with an untrustworthy person such as the last mentioned: and it will be shown later that the conduct of defendant's witnesses Nos. 3 and 11, of whom the former professes full knowledge of the importance of the document, was improbable in respect of their failure to rely on it.

The direct evidence in support of Exhibit VI standing thus, it might be unnecessary to deal with the plaintiff's argument to rebut it. One branch of that argument, his attack on the document on intrinsic grounds, has been considered fully by the lower Court, and we can concur on its rejection of it, because *data* for it are wanting. For it depends on the allegation that a different method of inscribing copper plates was in vogue in Jeypore in 1689 and on discrepancies between the terms of Exhibit VI and historical facts, or statements in Exhibit RRR, a communication by plaintiff to Government; and the allegation and facts are not, in our opinion, adequately established, whilst the statements are in no way binding on the plaintiff in this suit and may easily have been mistaken. The other branch of the argument, however, includes references to past occasions, on which it is alleged that Exhibit VI was, or, if it had really been in the Thatraz's knowledge or possession, should have been, relied on; and they would, in any case, have called for mention in connection with the nature of defendant's tenure and the plaintiff's right to resume. We, therefore, proceed to a survey of the course of defendant's enjoyment and deal with them as they occur in it.

Though Exhibit VI is dated 1689, it is admitted that its existence was not referred to until 1853 in Exhibit X. Defendant, however, relies, *first*, on the fact evidenced by certain copper plates, that the Thatraz was making permanent grants of land, as consistent only with his tenure having been such as Exhibit VI entails. Dealing only with those at the end of the 18th century, prior to the Permanent Settlement, I observe that the evidence for the authenticity of these copper plates is no better than that regarding Exhibit VI itself. The objection that the dates in Exhibits XXVIII, XXVIII*a*, XXVIII*b*, and XXVIII*c* are alleged to be inconsistent with one or other of the two Hindu systems of chronology, according to which they are stated has been established as regards at least Exhibit XXVIII*c*. Exhibit XXVIII series was not produced by the grantees, when the Agent inquired into alienations of state lands in 1896 (Exhibit QQQ); and the evidence as to custody, that of defendant's witness No. 6, does not show that it was proper, since there is nothing to connect the Seshaji Mutt referred to by him with the original grantees; the Mutt, in fact, relied also on another later grant, Exhibit CCCC, by plaintiff's predecessor. As regards Exhibit XXXII, dated 1768, there is the evidence of the grantee's descendant, defendant's witness No. 7, and the estate manager, defendant's witness No. 14.

Neither explains the recent custody of the document, or the fact that, Exhibit XXXII providing for a free grant, a quit-rent, which has once been enhanced, is now paid; the grantee was a Brahmin, and the grant should appear in Exhibit NNI among *shrotreims*, not among *tarast* or service *inam* villages. Exhibit XXVII in 1872 is the grant of a village mentioned in Exhibits NNI and QQQ; but no copper plate is re erred to in the latter, and the evidence of 16th defendant's witness as to the amount now payable to the Thatraz is not reconcilable with them, or the terms of the Exhibit. I cannot, in these circumstances, hold that these copper plate grants have been proved, or are the grants under which the properties in question are or were held. They would, in any case, be of small weight as assertions of ownership by the Thatraz against the Maharajah, when, as appears at pages 46 to 48, District Gazetteer, the whole District was the scene of armed conflict, in which both were active. This conflict ceased shortly before Lord Hobart's *cowle* and the Permanent Settlement.

It is urged, and the lower Court has held, that there is no special probability that Exhibit VI would, if it had existed, have been referred to then by the Thatraz or Government. We have already declined to assume that Government made no enquiries and had no knowledge as to the Bissemkatak tenure.

We add that the Thatraz, who was deprived of his immediate responsibility for collecting the *sayer*, can hardly have been ignorant of the pending Settlement and his duty to assert himself. Exhibit VII, already referred to, relates to the estate at this juncture. But we doubt whether it is safe to a gue, from the reference to Samburaj in it, in favour of or against enjoyment as Thatraz by defendant's predecessor.

The amount payable under the *sanad* then granted, Exhibit B, has been referred to by the lower Court as involving a substantial correspondence between the portion of it assessed on Bissemkatak and the Rs. 2,200 specified in Exhibit VI and as, therefore, supporting the existence of the latter in 1803. The argument, by which the apportionment to Bissemkatak of Rs. 2,229 out of the total *peishkush* is reached, is that based on Exhibits VII series and X, which we have already rejected. We add only that, if the liability of the Thatraz were really fixed under Exhibit VI, the difference of Rs. 29 would require explanation and that none has been given.

As regards the next period from 1803 until about 1845, it is plaintiff's case that before 1816 the Maharajah had removed the Thatraz and resumed his estate. Defendant entirely denies this, admitting, however, that the Maharajah attempted usurpation, waged war against the then Thatraz, Ramachandra, and imprisoned him. No distinct evidence as to this period is to be expected, when (as appears from the District Gazetter, page 368) "Jeypore remained an almost unknown quantity to the officers of the District." Exhibit ZZ series are indeed Jeypore accounts for 1833 and 1836, showing that a varying income, corresponding neither with that secured by Exhibit VI, nor any lease elsewhere referred to, was realised; but they are of no special value. If, therefore, a conclusion is to be reached, it must rest on the evidence as to occurrences in 1845 when, according to plaintiff, the imprisoned Thatraz, Ramachandra, and his son, Krishnachandra, were dead, and the latter's son, Narendra, attempted to regain possession (*vide* Exhibit TT2 and YY6, the latter a statement by defendant's predecessor). The only definite fact is that, as Exhibit F series, suit registers of the agent's Court, show, in 1845 and 1846, Narendra sued the Maharajah for possession of the Bissemkatak estate and for Rs. 4,500 profits; and the direct inference is that the former had been dispossessed. The lower Court has refused to draw it because (1) it accepted the statement of Narendra in Exhibit X in 1853, that the suit was for surplus funds after deducting the *jamabandi*, (2) the Maharajah, defendant, applied in the earlier suit by Exhibit XXXIX for attachment of the property and, therefore, could not have been in possession of it. But the answer to (1) is, *first*, that Narendra's statements in Exhibit X, made after the beginning of the dispute with the Maharajah, cannot be evidence in his successor's favour; and *next*, that there is no reason for preferring them to the explicit statements in Exhibit F series, official records, when, moreover, there is no reconciliation between the reference to surplus income less *jamabandi* as amounting to Rs. 4,800 and that in Exhibit F to the annual income as only Rs. 5,200. As regards Exhibit XXXIX, it is doubtful, in view of the probable laxity of procedure, whether any inference can be

justified. It is, however, to be observed that if, as the lower Court held and Narendra alleged in Exhibit X, the suits were for past income only, an application for attachment of the property itself would have been out of place. The explanation is porobably to be found in two facts. *Firstly* as Narendra admitted in Exhibit X and defendant in Exhibit YY6, the former's possession had been interfered with; and *secondly*, as Exhibit E series show, Bissemkatak had been attached by Government for arrears of revenue due by Jeypore, and its release was ordered in June 1844 or about a year before the earlier of the suits was filed. This attachment is not in itself significant with reference to the independence of the former estate since, on either party's case, it would have been liable for such arrears in consequence of its inclusion in the Jeypore *sanad*. But it is at least possible that the Maharajah took this opportunity and made his application in order to impose on the Court the responsibility for terminating the confusion in enjoyment, which the attachment would have enhanced. In dealing with this part of the case, the extent to which plaintiff's contentions are conceded is material. In Exhibit X, Narendra's petition in 1853, he said that he had been compulsorily prevented from managing, and defendant in Exhibit YY6 admitted that it was only in 1842, after the imprisonment and exile of his grandfather and father, that Narendra raised his forces to regain possession. When so much is admitted, there is no reason for distrusting the explicit statements in Exhibit F series that possession was sued for, or holdiag that Narendra was in possession in 1845-46. The suits (and it is possible that they were really only ones re-admitted and re-numbered, were in any case dismissed for default. The inference is *prima facie* that Narendra could not sustain them and had not the almost conclusive evidence, Exhibit VI, in his possession. The lower Court rejects this conclusion, *firstly*, on the ground that in the disturbed state of the country, these legal proceedings would have been "a sheer farce." But something more is necessary to explain Narendra's abandonment of litigation, which he had thought it worth while to institute. Defendant's explanation is based on the statement in Exhibit X that satisfaction was obtained from the Maharajah out of Court, presumably the lease at Rs. 1,500 referred to in Exhibit K; and it is argued that having obtained this low rental, Narendra would not have relied on Exhibit VI, which made him liable for Rs. 2,200. But Exhibit X is, as already observed, inadmissible in defendant's favour. The lease at Rs. 1,500 is referred to only in Exhibit K and it is described there as justified by the jungly nature of the estate and as merely temporarry; and it, therefore, was not obviously more advantageous than the permanent tenure under Exhibit VI. Moreover, if the latter document had existed, it is to be supposed that it was known to the Maharajah, or would have been brought to his notice in the course of the negotiations; and that its surrender would have been insisted on. The inference that Exhibit VI was not in Narendra's possession at this time must, therefore, be sustained.

This deposition of the Thatraz and his re-entry are the foundation of plaintiff's conditions, that his services were dispensed with by the Maharajah and his estate resumed, that his original right was extinguished and that, whatever its extent, the new grant under which he re-entered does not justify his present pretensions. This contention is the subject of issue V. We concur in the lower Court's finding on it in defendant's favour holding that the occurrences between 1824 and 1842 left the right of his predecessor unaffected. That decision, however, will not be of use to defendant, since we shall hold that such right was not as extensive as he alleges; and we, therefore, give our reasons for it only shortly. *Firstly*, with reference to *Vizianagaram Maharaja* v. *Suryanarayana* (1), we do not think that the evidence establishes anything of the nature of a resumption and regrant on a new *sanad* and different tenure, or more than a dispossession and re-instatement. And next, so far as plaintiff relies on defendant's failure to regain possession by suit during his exclusion from the estate over twelve years, from 1824 till at least 1842, more probably 1846, that is supported only by reference to S. 18, Regulation II of 1802, and *Sita Ram Vasudev* v. *Khanderav Balkrishna* (2), *Radhabai and Ramachandra Konher* v. *Anantrav Bhagvant Deshpande* (3) and *Gunga Gobind Mandul* v. *Collector of the Twenty-four Pergunnahs* (4). Those decisions, however, dealt with the Regulation applicable in Bombay;

(1) (1886) 9 Mad. 307 = 13 I. A. 32 (P. C.)
(2) (1875 **76**) 1 Bom. **286.**
(3) (1885) 9 Bom. **198.**
(4) (**1867**) **7** W. R. **21**=**11** M. I. A. **345** (P.C.).

and the lower Court was right in following *Secretary of State* v. *Vira Rayan* (5) to the contrary effect. Reference may also be made to the decision of the Privy Council in *Fatimatulnissa Begum* v. *Sundar Das* (6) on S. 1, Act XIV of 1875, a provision similar to that in the Madras Regulation. Authority is against plaintiff's contention and it must fail.

The lease at Rs. 1,500 is referred to in Exhibit K as granted by the Maharajah. But in the plaint it is alleged as granted by his son who was at feud with him, and as subject to a further obligation for service with 700 *paiks* (men-at-arms). We shall return to the evidence regarding service. It is sufficient that this lease was superseded by another in 1854 at Rs. 2,500 with the same condition for service. The lower Court's finding to that effect is not disputed, and the objections to it and subsequent leases based on coercion and misrepresentation have not been pressed in the Court. Reference has already been made to Exhibit X and the Agent's attempted negotiation in 1853 in connection with the alleged first reliance on Exhibit VI; and it is now to be noted that the failure of the Thatraz to appear before him and produce that document acquires additional significance in view of his further failure to rely on it to resist the enhancement of rent, which took place in the following year. There is, mareover, the fact that the translation given in Exhibit X of the copper plate then referred to differs from Exhibit VI in the important respect that it does not specify the Thatraz or any other person as grantee, an omission not likely to have been due to inadvertence in the circumstances. There is, accordingly, room for doubt whether Exhibit VI was in fact referred to in Exhibit X and strong reason against belief in the Thatraz's possession of it. There is no suggestion in Exhibit YY6 that this rent of Rs. 2,500 was not paid from 1855 to 1863; and Exhibit WW, a return submitted to Government in 1862, refers to it. The fact that this lease was superseded in 1864 by another at Rs. 5,000 is not disputed here. It is, however, contended that the latter had no effect, because there is no evidence of any payment of rent under it, and that it involved no enhancement of rent, because it included in addition to Bissemkatak additional land, the Rayabiji Muttah. But, the lease being admitted, it is for defendant to show that it was ineffective; and, though these is no evidence on either side as regards the period there is again no suggestion in Exhibit YY6 consistent with defendant's contention, and there are explicit references to this lease in the next lease, Exhibit HHH1 and Exhibit HHH2. The argument that there was no enhancement is untenable, being based only on the fact that in 1865 the Dewan of the Thatraz remonstrated with the Maharajah for not reducing the people of Tayabiji to submission in accordance with his promise and on the inference that Rayabiji had been newly included in the lease. That inference, however, corresponds with nothing in Exhibit YY6, or elsewhere in evidence. It was not suggested in the lower Court, and it is not clear from any available information, that Rayabiji had not been leased as part of Bissemkatak throughout. The next and last lease, that in 1877, is evidenced by Exhibit HHH1, copy of *patta* obtained from the Agent's office, the original having been lost or destroyed by fire (*vide* Exhibit TT); and the first point taken against it is that it is inadmissible, because the original would be inadmissible, being unstamped. The *first* answer is that no Stamp Act is shown to have been applied to the Vizagapatam Agency, including Jeypore, after the supersession of the ordinary law in it under Act XXIV of 1839. The *next* is that the originals of Exhibit HHH series cannot be taken to have been unstamped, if a stamp was required. The burden of proof that this was so would in England be on defendant's side [*Marine Investment Co.* v. *Haviside* (7)]. But, even if the law is different in India, we should still hold on the evidence that Exhibit HHH1 had been duly executed. The oral evidence of persons who saw it is interested and untrustworthy on both sides. Nothing can be inferred from plaintiff's failure to produce the corresponding *muchilika*, the original of Exhibit HHH2; for there is no reason for supposing that it would show whether the *patta*, Exhibit HHHI, was stamped or not. But then, apart from any presumption under S. 114 of the Indian Evidence Act, there is the correspondence to be referred to, which shows that the transaction was carried through with the knowledge of the Agent and his assistant, who might, at any time,

(5) (1886) 9 Mad. 175.
(6) (1900) 27 Cal. 1004=27 I. A. 103 (P.C.).

(7) 5 H. L. 624.

have called for the original document and would have impounded it, if it had been their duty to do so; and there is the evidence of defendant's witnesses Nos. 3 and 15 and Exhibit XXXI to show that it was actually on one occasion sent to the Agent for reference. In these circumstances, a decision is justified that it was in order and bore a stamp, if in fact a stamp was required. Defendant has applied to us to admit further documentary evidence in appeal from the records handed over to him by Government, after he attained majority. But we find that he was informed of the existence of these records and invited to arrange for their transfer by the Agent's letter, dated 22nd February 1910, filed with his affidavit, that is, after the examination of plaintiff's witness No. 11 and before his own evidence was taken. If, therefore, he had shown ordinary diligence, he could have produced these documents at the trial. Their admission now would, accordingly, be unjustifiable.

The evidence regardiug this case is contained in Exhibit G, H, J, GG, RR, SS, GGG, HHH LLL series and XXVI. It shows that owing to the failure of the Thatraz to perform what may for the present be referred to as his service on two occasions, the Maharaja proposed to resume his estate; that the Agent, who was informed of this intention, intended to inquire judicially into his right to do so or to enhance the rent, and reported his intention for the information of Government; and that, when the Settlement embodied in the original of Exhibit HHH was effected, he insisted on satisfying himself as to its terms. The proceedings were, accordingly, in no way hurried or perfunctory, and the Thatraz was in effect invited to resist an enhancement. Yet he made no attempt to do so by alleging the existence of Exhibit VI, or moving the Agent to obtain its production. The result was that he accepted Exhibit HHH with the greatly increased rental of Rs. 15,000 and an obligation for attendence with 500 *paiks*.

In the succeeding year, as Exhibit FFF shows, the Thatraz considered himself bound by Exhibit HHHI: and Exhibit KKK series, the Jeypore accounts, justify a conclusion that payments were made in accordance with the lease until defendant's accession and the assumption of charge of his estate by Government during his minority. He, in fact, gave effect to his intention expressed in Exhibit FFF and attempted to presume on the increase in his own rent by raising that of the holders of three subordinate tenures, one created by himself, *Vide* Exhibits N, O, Q, R. From 1877 until 1890, the only other incident calling for notice is the Agent's statement in Exhihit TT2, a report in 1883, that he had heard at Bissemkatak of a copper plate *patta*, which was not then to be found. But this reference is not of weight, since there is nothing available regarding the extent of the Agent's inquiries, or the source of his information; and as he referred to the *patta* as for Rs. 2,500, it in no way probablises the case for Exhibit VI for a rent of Rs. 2,200. After Government assumed charge of the estate, Rs. 15,000 was paid annually without demur on the part of defendant's relatives, although, in recommending the assumption in Exhibit TT, the Agent had doubted "whether the grant should be acknowledged in its present permanent form." His doing so possibly led to defendant's present attempt to disclaim it. The manner, however, in which the attempt was made, indicated no intention to rely on any tenure such as Exhibit VI. For, it began with a plea in Exhibit GG, that it would be inconvenient or impossible to render service and it was only in Exhibit YYI that plaintiff was informed of the claim to hold at a permanent rent of Rs. 2,200 without service, and that claim was then based, not on Exhibit VI, but on the Permanent Settlement.

This closes the story of the relations between the parties; and the first conclusion authorised by it is against the authenticity of Exhibit VI. Whatever the interest or duty of the Thatraz to plead it up to and at the Permanent Settlement (and it is not so clear, as the lower Court supposes, that he had none) his failure to rely on it on subsequent occasions is irreconcilable with his knowledge, or possession of it, or its existence. It has already been shown that the evidence as to its custody immediately before its production in 1891 is unsubstantial. In these circumstances, we cannot make any presumption under S. 90 of the Indian Evidence Act regarding it and we, therefore, dismiss it from consideration, finding issue II in plaintiff's favour.

This result reached and defendant's arguments founded on Exhibit B series, VII series and IX having been rejected, there is no reason against accepting plaintiff's contention, based on the explicit and unqualified references to Bissemkatak in Exhibits A and D, that it formed part of the assets on which plaintiff's *zemindari* was permanently settled and was not treated as *lekhiraj* or land exempt from the payment of public revenue. That is our finding on issues I and III. The question is then whether the Maharajah was entitled to make the subsequent enhancements of rent and whether plaintiff is entitled to claim at Rs. 15,000, the rate provided in Exhibit HHH1.

Defendant relies in this connection on the reference in clause 4 of the *sannad*, Exhibit D, to "alienated lands, paying a small quit-rent, (which quit-rent, unchangeable by you is included in the assets of your *zemindari*") as an unqualified prohibition of enhancements, such as plaintiff has proved. Comparison of the clause with the corresponding S. 4 of Regulation XXV of 1802 shows that "a small quit-rent" meant a favourable one. But the provision is otherwise obscure and we have been shown no authority explaining it. Argument has been based on S. 12. It, however, forbids only the appropriation of land to religious or other purposes with the intention that it shall be exempt from its portion of the public tax and the resumption or enhancement of the assessment on land already so appropriated at the date of the Settlement. We observe, *first*, that the word "alienated" in clause 4 is, in our opinion, to be understood as covering only permanent grants, since there is no warrant in authority or practice for applying it to mere temporary leases, however long their currency, such as those pleaded by plaintiff, which are not shown to have been, or to have been understood by the parties to them as being, permanent. *Next*, none of those leases is shown to have been at a favourable rent. For, the only evidenee as to the actual yield of Bissemkatak is the Circuit Committee's account, Exhibit NNI, and we agree with the lower Court that it is of little value [*vide* also *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (8)] and there is nothing improbable in the suggestion made in Exhibit K and elsewhere that the rent was increased, as the country was reclaimed. *Lastly*, clause 4 in our opinion, prohibits enhancements imposed by the *zemindar*, not those, to which the lessee consents, as we have found that the Thatraz did in the present case. In the result we find on issues VI—VIII and XVII that the rent of Rs. 15,000 and the other enhanced rents accepted previously in 1854 and 1864 were not within the mischief of, and the first mentioned is not unenforceable by reason of, clause 4 of Exhibit D. No other objection has been argued in this Court in this connection, and plaintiff is, therefore, entitled to recover the amounts claimed by him in accordance with Exhibit HHH1.

His *remaining* claim, to resume defendant's estate, must be dealt with on consideration of the service character of its tenure. For, it is not suggested that defendant would not be entitled to relief against the forfeiture incurred in respect of his default in payment of rent; and his description of his holding as independent and permanent at a fixed rent in Exhibit BB is not such a repudiation of his landlord's title as would entitle plaintiff to relief [*Kali Kishen Tagore* v. v. *Golam Ali* (9), *Kali Krishna Tagore* v. *Golam Ally* (10) and *Unhamma Devi* v. *Vaikunta Hegde* (11)]. Detailed reference to the evidence as to service has hitherto been postponed for the sake of clearness; and we now refer shortly to the law before dealing with it. Numerous authorities have been cited. But it is useless to refer to cases such as *Raja Venkatarangayya* v. *Poranki Appalarazu* (12) and *Parthasarathy Appa Rao* v. *Secretary of State* (13) in which the claim to resume was made by Government, not the *zemindar*, when the material principles really lie in a small compass and can be gathered directly from two decisions, one of them recent, those of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* (14) and *Venkata Narasimha Appa*

(8) (1906) 29 Mad. 52=33 I. A. 46 (P. C.)
(9) (1886) 13 Cal 3.
(10) (1886) 13 Cal. 248.
(11) (1894) 17 Mad 218.
(12) (1910) 8 I. C. 546.
(13) A. I. R. 1915 Mad. 122=21 I. C. 871
(14) (1870) 14 W. R. 28=13 M. I. A. 438 (P.C.)

Rao Bahadur v. *Sobhanadari Appa Rao Bahadur* (8). The *first* condition, on which they contemplate resumption as permissible, is that the estate shall have been included in the assets of the *zemindari* on which the Permanent Settlement was made; our finding of fact already reached entails that this condition is complied with, and it is unnecessary for us to found our conclusion on the presumption based on the nature of the service, regarding which argument was offered. The next condition is that either the grant is for service in lieu of wages, in which case the grantor's right to resume is absolute, or that, if the grant is of an estate burdened with service, the grantee, even if that service is obsolete or unnecessary, is unwilling or unable to perform it. In the present case, however, it is in fact unnecessary to inquire which of these descriptions is applicable to the grants, because in his letter, Exhibit BB, defendant denied his obligation to render service and impliedly refused to perform any; and such inquiry would, moreover, be meaningless, because both descriptions assume that an enforceable obligation for service is in question, and we shall hold in accordance with defendant's contention that none is established. In these circumstances we do not consider at length how far the tenure of Bissemkatak possesses the characteristics of a grant subject to a burden of service enumerated by this Court in the portion of its judgment in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (8), which the Privy Council adopted. For only the presence of the second, fixity of tenure, could be discussed. As to it, a finding in the negative would follow from our conclusion that the rent was enhanced on three occasions.

The lower Court's findings are that the nature of the service up to 1863 was uncertain and that after that year it was rendered as matter of courtesy. It did not decide, as we are asked to do, whether anything which can be described as service is exigible from defendant at all. His obligation is described in Exhibit HHHI as attendance (1) with 500 *paiks* at Dusserah on the occasion of the annual festival and Durbar and (2) whenever such attendance is directed, when the Thatraz goes on *sircar* business. The question is whether this description, read in the light of history, or as it stands, involves anything enforceable as a condition of the holding.

There is little doubt that prior to Permanent Settlement Bissemkatak was held primarily on a military tenure. No doubt, the only distinct evidence to that effect is Mr. Oram's statement in Exhibit NN1. But the fact would be in accordance with the usage of this part of the country, as disclosed elsewhere in that report and the Gazetteer; and there is defendant's admission in Exhibit YY6, in accordance with his predecessor's statement in Exhibit X, that Malloo Mahunty, who held the estate in the seventeenth century, "formed a well-organised force of armed men to protect himself" and that his son promised Jeypore "military aid in exchange for a formal acknowledgment of his title." Such military arrangements, of course, should have ceased with the Permanent Settlement in 1802; and it cannot matter that the unauthorised maintenance of armed force was actually continued till later, except in so far as it can be shown that those forces also performed private service, which the law permitted. Such maintenance is, in fact, referred to by Col. Campbell in 1852, in Exhibit XXVII*a*, when the Thatraz used his force against that "of his superior of Jeypore." And in Exhibit XXVII*b*, in 1861, Sir W. Robinson wrote regarding the absence of any provision of Government for Police and Magistracy in Jeypore and the anarchy which had resulted from the failure to assume control from the *zemindar*, who was not providing for it efficiently. In 1863, when the Government Police was established, the Agent, Mr. Carmichæl, in Exhibit XXIV, stated that the Thatraz had been maintaining two hundred salaried peons and that every third man in Bissemkatak village swaggered about with a sword. He said that Jeypore "though everywhere acknowledged as Suzerain, had not always the direct control," and made the first distinct allusion to the nature of the service as having been "commuted into a yearly tribute of Rs. 2,500; besides which, when specially called on to do so, the feudatory is expected to accompany the Suzerain with a numerous retinue on his travels. The last occasion of his doing so was during the visit paid

by the present Rajah of Jeypore to the Rajah of Vizianagaram in 1859. The Thatrajah then came forward with a rabble of five hundred men." The questtons to which the existence of these irregular forces gave rise, were in fact stated twice from the point of view of Government by another Agent, Mr. Goodrich, in 1875 and 1877, in reports, Exhibits XXV and XXVI. In the first, with general reference to the Jeypore Agency, he mentioned the existence of "a numerous body of *paiks*, whose tenures require revision. Upon them, by the tenure of their assigned salaries or favourably assessed lands, are incumbent the Police duties of the country, the guarding of prisoners, the escort of treasure and the general duties of subordinate revenue servants." In the second, on the occasion of the death of one Thatraz, he spoke of enhancements of rent by the Maharajah and went on to refer to the subsistence of customary service after its original military justification had been abolished. In both reports, although his point was the advisability of Government taking advantage of the service, he recognised that its character had changed and in the earlier he defined its subsisting civil and private characteristics. The period was one of transition and the evidence regarding it general, the one reference in it to a particular incident, the journey to Vizianagaram, being misleading since "the present Maharajah" in 1893, the date of Exhibit XXIV, had inherited in 1860 (*Vide* Gazetteer, page 264) and the action of the Thatraz in accompanying him in 1859 before his accession is, therefore, inconclusive and may perhaps have been part of one of the latter's intrigues against his predecessor (Gazetteer, pages 268, 269). The result is, at most, that the service, after the loss of its military character, was still regarded as subsisting for private purposes and more loosely, for such purposes as the disturbed and unorganised condition of the country led the Maharajah to provide for until ahout 1863. Those purposes probably included such duties in respect of the maintenance of law and order as the Code of Criminal Procedure wovld have impossd on landholders on the plains. But there is nothing to support a distinct conclusion as to what they were, or to show that they were of a public nature or to explain or define the terms of Exhibit HHHI.

The evidence as to the service of 700 *paiks* stipulated for by the lettings in 1854 and 1864 is general. In Exhibit UUU Government opined that the service was to wait on the Maharajah with a retinue of *paiks* or peons on occasions of importance, consistently with the terms of the lease of the same year, Exhibit HHHI, which have already been given. After 1877, we have indications that the Thatraz was regarded by Government as able to embody some sort of force, Exhibit AAAA series and Exhibit XXII*b* and Exhibit XXIIc. But they do not entail his being in any way subject to Jeypore for the purpose. For they are all calls for assistance in quelling the same disturbance in 1880; and it is not material that Exhibit AAAA series were addressed to the Maharajah, when the other two were addressed to the Thatraz direct. As regards the duty to attend at Dusserah, default in it had been the beginning of the incidents which resulted in Exhibit HHHI in 1877. The correspondence has already been referred to and no doubt indicates that the Thatraz did not demur to the Maharajah's pretensions. Subsequent exhibits, Exhibit CCC series and TT2, show that up to 1887 there had been attendance at Dusserah in some years and apologies for absence in others. During the minority of defendant from 1889 till 1903 the obligation to attend was commuted by the Agent in charge of his estate for a money payment, apparently without demur from his relatives. But on attaining majority, defendant, as already stated, having at first explained his absence on grounds of inconvenience, finally disclaimed all obligation in Exhibit BB.

The evidence, so far referred to, relates only to attendance at Dusserah, that being the first condition referred to in Exhibit HHH1. The second condition, attendance when on Sircar business, is so indefinite as to be unenforceable; and we refer to it no further. It is, accordingly, on the character of attendance at Dusserah as an enforceable condition of the tenure that plaintiff's case depends. We do not think that attendance on ceremonial occasions is such a condition. No witness, who spoke to the course of the Durbar which is held, described

anything beyond the compliments usually paid by an inferior to a superior as passing; and we have been referred to no authority dealing with a claim to resumption, in which an obligation merely to be present, even accompanied by a retinue, was regarded as sufficient. In every case, the service consisted in the doing of some act for the benefit of the grantor ; and we have been shown no reason why less should be required to prove the service character of the tenure here. Defendant's duty is at most analogous to that of English copyholders to do suit it the Court of their manor ; and default in it will not entail termination of the holding (Halsbury's Laws of England, Volume VIII, page 14.)

Default in this attendance being insufficient to support plaintiff's claim, he has attempted to prove that a further duty, not referred to in Exhibit HHH or definitely in any record, has been annexed to it by custom, that of guarding the idol, which on the occasion of the Dusserah is taken in procession, and he has argued that some inference as to the existence of definite enforceable duties is entailed by defendant's enjoyment of the title of Thatraz, signifying lord of the army. The *second* point can be dealt with shortly. We no doubt find defendant's predecessors enjoying that title from the earliest times and there are references, for instance in Exhibits HH, YYY, XXVI, to some sort of investiture, though it is not clear that it related to the title, not the estate. But it does not follow that any office, or, after the abolition of the military service, any distinctive duties were in question. For the defendant's witnesses speak of other petty tenure-holders, described only as Patros, fulfilling similar, though smaller, obligations in the way of attendance with *paiks* at Dusserah, and the lower Court has mentioned two *zemindars* whose use of the title of Thatraz is recognised, though they are independent of any superior (Gazetteer, page 298). There is, accordingly, no reason for presuming any connection between the title and subsisting obligation for service.

Lastly, as to the evidence that the Thatraz is bound to provide a guard for the idol, it is that his *paiks* take part in the procession and that a few of them guard the temple ; but it includes no reason for assuming that they do so in the performance of a duty, and not in the enjoyment of a religious privilege. There is some evidence, that of 6th, 7th, 9th plaintiff's witnesses, that they received *batta* from the Maharajah. But it is contradictory and worthless ; and, as it does not show whether the payments were simply for expenses or included remuneration, it would, if accepted, prove nothing. In these circumstances we find that no duty to guard the idol is established. As we have found that mere attendance with *paiks* at Dusserah is not a service default in which would justify resumption, our decision on issues IX and X must be against the plaintiff's right to resume.

We, accordingly, allow the appeal, modifying the decree of the lower Court to the extent that plaintiff will have decree for Rs. 45,000 in respect of the *Kattubadi* or rent due for *Faslis* 1313, 1314, 1315, with interest at 6 per cent. per annum to date of lower Court's decree and subsequent interest at 6 per cent. This suit is in other respects dismissed. Each party has failed as regards a substantial part of his case. We, therefore, make no order as to costs in either Court.

Sankaran Nair, J.—I agree. The compromise of 1877 and the exchange of *patta* and *muchilika* in the same year are not denied in appeal. The Agent holds that the agreement is illegal as it is opposed to S. 4 of the Permanent Settlement Regulation of 1802 and clause (4), Exhibit (D).

I am unable to agree with the Agent that the agreement is illegal on that ground. If Exhibit VI is genuine, there is nothing to show that the amount payable under it was only a quit-rent and there is no pretence for saying that it was a favourable quit-rent. But I agree with my learned brother that it is unsafe to act upon Exhibit VI.

The above observation as to the rent under Exhibit VI applies also to the amout, if any, payable to the plaintiff according to Collector Alexander in 1803. The increase of rent on more than one occasion, with the knowledge and approval of the Collector, and the reason assigned for it, *i. e.*, increase in cultivation, show, on the other hand, that what was paid was not quit-rent. Nor is there anything to show that what the chief of "Bissemkatak" was liable to pay

before the Permanent Settlement was rent for the use of land. It might have been tribute that he paid. In fact, there is no evidence to show the legal relation which subsisted between Jeypore and Bissemkatak, or that it was under a grant from the Jeypore Rajas that the Bissemkatak chief acquired this tract of country. It was not "alienated" land under clause (4), Exhibit D. Again, if the latter was liable to render military service to his Sovereign, then he was not holding the land for any quit-rent only and on that ground also the section would not apply.

For these reasons I hold that the agreement is legal and valid.

The defendant must, therefore, pay the rent due under the *patta* and *muchilika*.

It was then argued that according to the terms of the *patta*, the defendant is bound to render service and as he has failed to do so, the plaintiff is entitled to recover possession. Assuming the defendant is bound to render service under the agreement of 1877, there is nothing to show that the defendant forfeited the *raj* on default to render the same. The *patta* does not make it a condition. Considering that the chief of Bissemkatak was a ruler and a landed proprietor, who held land brought by him under cultivation, very strong evidence is required to prove any condition of forfeiture as alleged by appellant. The nature of the so-called service places the matter beyond doubt. The alleged service is said to be attendance at the Dusserah festival and for certain other ceremonial purposes. Besides being indefinite, this is not service. It is only a mark of respect which every person, even an official, is expected to pay and pays to his superior. I agree with what my learned brother has said on this question.

On this view, it is unnecessary to consider the relations of the parties before the agreement. If it is, I agree with my learned brother in his observations with one exception. I do not think that sufficient reasons have been shown to differ from the finding of the Judge in paragraph 19 of his judgment that the grants made by the Bissemkatak chief are genuine. This, however, does not affect the result.

S. N./R. K.

Appeal allowed : Decree modified.

A. I. R. 1916 Madras 263

WALLIS, C. J. AND SRINIVASA AIYANGAR, J.

Gopisetti Narayanaswami Nayudu Garu—Plaintiff—Appellant.

v.

Nalam Subrahmanyam—Defendant—Respondent.

First Appeal No. 75 of 1914, decided on 28th July 1915, against the decree of Tempy., Sub-Judge, Ellore, in Original Suit No. 33 of 1913.

(a) Evidence Act (1 of 1872), S. 114 – Village grant recorded as rent free—Existence of minor *inams* does not affect presumption of grant of whole village rent free.

Where the grant of a village is described in various documents as a rent-free grant to a temple, the presumption is of a grant of the whole village and the existence of "minor *inams*" in the village will not affect that presumption unless it is proved that the grant was only of the revenue of a portion of the land in this village. [P. 264, C. 1.]

(b) Madras Estates Land Act (1 of 1908), S. 3 (d)—*Inamdar* not owner of *Kudivaram* at time of grant—It is estate within S. 3 (d).

Where the *inamdar* grantee was not the owner of the *kudivaram* at the time of the grant, the subject of grant is an estate within the meaning of clause (*d*) of S. 3. [P. 264, C. 2.]

(c) Madras Estates Land Act (1 of 1908), S. 6—Receiver competent to grant leases is "land-holder."

A Receiver having the power of letting tenants into possession of lands in an estate is a "land-holder" within the meaning of S. 6. It is not necessary that the land-holder should also be a beneficial owner of the estate. [P. 264, C. 2.]

P. Nagabhushanam—for Appellant.

P. Narayanamurthi—for Respondent.

Judgment.—Plaintiff, the Receiver of the Nidadavole Estate sues to recover possession of certain lands let to the defendant in *Fasli* 1320 together with mesne profits. His case is that the letting was for one year, and that the defendant is holding over after the expiry of the term. The defendant pleads that he has acquired the occupancy right to these lands under S. 6 of the Estates Land Act. The lower Court has dismissed the suit, and the plaintiff appeals.

The principal question which arises for determination in the appeal is whether Venkatapuram Agraharam in which the suit lands are situate is an estate within the meaning of S. 3, sub-S. 2,

clause (*d*) of the Estate Land Acts. Venkatapuram Agraharam is an *inam* village belonging to Bala Venkateswara Swami and the grant seems to have been made by a former *zemindar* of Nuzvid. The plaintiff sues as trustee of the temple. The Venkatapuram Agraharam is described in the various documents filed in the case as the *sarva* or rent-free Agraharam of Sri Bala Venkateswara Swami, and this description occurs from the earliest times. (See Exhibit H, the *jamabandi* account for *fasli* 1268.) This would obviously mean that the whole village of Venkatapuram belonged to the temple as *inam*. However, there are certain minor *inams* in this village which appear to be of three classes; one class of *inams* being *archaka* service *inams*, the other class being village service *inams*, and the third *dharma dhaya inams*. It does not appear whether the grant to the temple of the village was made first or whether the minor *inams* were granted first.

The appellant contends that inasmuch as there are these minor *inams* in the same village it could not be said that the Venkatapuram Agraharam is a village of which the land revenue has been granted as *inam*, within the meaning of S. 3 clause (2) (*d*) of the Act, his contention being that inasmuch as the land revenue on some of the lands in the village had been granted as *inam* to third parties, it cannot be said that the temple is the grantee of the revenue of that village. We are unable to agree in this contention. The definition in Sub-S. 2, clause (*d*), was obviously intended to exclude from the definition of "estate" what are known as "minor *inams*" namely, particular extents of lands in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as "whole *inam* villages."

The existence of 'minor *inam*' in whole *inam* villages is very common and if these *inam* villages do not come within the definition of "estate" almost all Agraharam, Shrotriem and Mokhasa villages will be excluded. This certainly cannot have been the intention of the Legislature. These minor *inams* are generally granted for services to be rendered to the village or to the owner. That seems to be the nature of the minor *inams* in this case. In all the documents the temple is described at the owner of the whole village and in these circumstances the burden is upon the plaintiff to show that the grant was only of the revenue of a portion of the lands in the village, and he has not put in evidence the *inam* register which would have supported his case if true. We disallow this contention.

It is next contended that it is not shown that the *inamdar*, that is the temple, was not the owner of the *kudivaram* at the time of the grant, which again would take the case out of the definition of an estate. The evidence which is discussed in paragraphs 15 to 17 of the lower Court's judgment shows clearly that the *inamdar*, namely, the temple was not the owner of the *kudivaram* at the time of the grant. We, therefore, hold that the Venkatapuram Agraharam of which Sri Bala Venkateswaraswami is the *inamdar* or the Agraharamdar is an estate within the meaning of clause (*d*) of sub-S. 2 of S. 3 of the Estates Land Act.

Mr. P. Nagabushanam, for the appellant, also argud that the suit lands are not '*ryoti* lands' but are 'old waste'. In the *muchilika*, Exhibit B, executed by the defendant, these lands are described as '*jeroyti* lands' and in Exhibitit IX, a previous lease of the same lands, they are described as '*mamool* wet'. We hold, therefore, that these lands are not proved to be 'old waste'; but are '*ryoti* lands'.

The appellant finally contended that the Receiver is not a land-holder within the meaning of S. 6 of the Act. It is admitted that the definition of 'land-holder' in S. 3 includes the plaintiff. But it is said that unless the land-holder is also a beneficial owner of the estate, he is not a land-holder within the meaning of S. 6. We do not see any reason to put any such restricted construction on the word 'land-holder' in that section. A Receiver must have the same powers of management as an owner, and letting a tenant into possession of cultivable lands in the estate would ordinarily be included in the power of management. We agree in the conclusions of the lower Court and dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 265

MILLER AND SPENCER, JJ.

Zemindar of Sivagiri—Defendant—Appellant.

v.

Micheal—Plaintiff—Respondent.

Second Appeals Nos. 2280, 2281, 2282, 2283 and 2284 of 1912, decided on 10th October 1913, against the decree of Dist., Judge, Tinnevelly, in Appeal Suits Nos. 156, 158, 160, 159 and 157 of 1912.

(a) Madras Estates Land Act (1 of 1908), Ss. 54 and 78—*Patta* affixed to house on refusal is not valid tender—Attachment of holding is therefore illegal.

(Per *Miller, J.*)—On refusal it must be affixed to land. [P. 265, C. 2 & P. 266, C. 1.

Where a *patta* was offered to a *ryot* and refused and then affixed to his house :

Held, there was no valid tender of the *patta* as required by Ss. 54 and 78, clause 2 of the Estates Land Act and an attachment effected by the landlord of his tenant's holding was, therefore, illegal. [P. 265, C. 2.]

Per *Miller, J.*—When once an offer is made and refused, the tender by delivery cannot be effected and it then becomes necessary to affix the *patta* to the land and if this is not done, there is no valid tender of the *Patta*.

[P. 265, C. 2 & P. 266, C. 1.]

(b) Madras Estates Land Act (1 of 1908), S. 54—Prescribed methods of tender must be followed.

S. 54 does not permit the landlord to select the method of tender which is not one of those prescribed by the section itself. [P. 265, C. 1.]

(c) Madras Estates Land Act (1 of 1908), Ss. 54 and 78—(Per Spencer, J.)—Tender may be by delivering copy of *Patta*—Term 'delivery' explained.

Per *Spencer, J.*—Ss. 54 and 78 of the Estates Land Act, read together, show that a tender of *patta* may be made by delivering a copy to the defaulter. The word 'delivering' denotes a transfer of possession of the document and the action of delivering cannot be completed by one person who delivers without involving a reciprocal action of another who receives. [P. 267, C. 2.]

C. P. Ramaswami Aiyar, A. Duraiswami Aiyar and *M. Subbaraya Aiyar*—for Appellant.

V. Viswanatha Sastry—for Respondent.

Miller, J.—I cannot accede to the contention that S. 54 permits the landlord to select the method of tender which is not one of those prescribed by the section itself and to treat the provisions of S. 78 (2), as merely affording him a way of proving that he has made a tender. That might have been possible under S. 7 of the Act of 1865, which enacted what should be deemed sufficient proof of tender, but is not possible under the present Act, which enacts how tender may be effected. The word 'may' indicates that the landlord can choose between the methods provided but not that he is at liberty to select some other method. It would require clearer language to warrant the construction contended for by the appellant.

Reading Ss. 54 and 78 (2) of the Act together, tender of *patta* may be made by delivery to the *ryot*. The Civil Procedure Code, O. 5, R. 16, seems to draw a distinction between tender and delivery, but, no doubt the Legislature is entitled to prescribe delivery, if it so pleases, as necessary to complete a tender.

The question is whether when a *patta* is offered and refused, it has been sufficiently tendered.

The *patta* here was offered and refused and was then affixed to the *ryot's* house. S. 78 (2) does not provide for affixing a *patta* to a house but only to the land—when service by delivery cannot be effected. If then this offer and refusal is not a sufficient tender within the meaning of the Act, the affixing of the *patta* to the house does not seem to be of any use to the landlord—though it is not improbable that the omission from the present Act of that method of tender was intended to be for his benefit.

So, if the *patta* was validly tendered in this case, it can be only on the ground that it was delivered to the *ryot*. It is not said that it was delivered to anyone on his behalf.

Now, the landlord has not merely to deliver himself of the *patta*, he has to deliver it to the *ryot* and giving the widest meaning. I can to the word 'deliver,' I do not see that it is possible to hold that an offer of the *patta* to the *ryot* is delivery to him.

The Code of Civil Procedure has, wisely I venture to think, provided expressly for this case of tender and refusal of summons (O. 5, R, 17). In the Estates Land Act, there is no express provision in S. 78 (2) and I agree with the District Judge that it is necessary to hold that, when once offer is made and refused, the tender by delivery cannot be effected, and it then becomes necessary

to affix the *patta* to the land. If this is not done, there is no valid tender of the *patta*.

The appeals fail, in my opinion, and must be dismissed with costs.

Spencer, J.—Second Appeal No. 2280 is a suit brought under S. 112 of the Madras Estates Land Act objecting to the attachment by a landlord of the lands of his tenant.

The plaintiff alleged, *inter alia*, that no *patta* was tendered. An objection was taken at the trial that, because the *patta* was affixed to the house of the plaintiff instead of the land as required by Ss. 54 and 78, clause 2, of the Estates Land Act, the tender was illegal. The Deputy Collector found that when the Estate servants went to the *pattadar's* house with *patta*, he was present in his house and he refused to receive it, and, consequently, it was affixed to his house. He observed that, in his opinion, there was no necessity for affixing the *patta* to the land as that was "a course evidently meant to be adopted only in the case of absentee *pattadars*." He found this issue in favour of the defendant, and the plaintiff failing on the other issue, the suit was dismissed with costs.

In appeal, the District Judge held that a tender or service under S. 78 (2), was "not completed by mere physical offering of the *patta* or notice to the tenant." He held it to be essential that the tenant should either receive it, or if for any reasons he did not receive it, that the requirements of the law as to affixture should be complied with. He agreed with the lower Court in finding that it had been proved that the *patta* was tendered to the tenant and affixed to his house as he refused to receive it; but as the *patta* had been affixed to the plaintiff's house instead of being posted upon the land, he reversed the lowet Cour'ts finding on this issue and cancelled the attachment. Both Courts agreed in finding the remaining issue in favour of the defendant.

S. 53 of the Madras Estates Land Act declares:—"No landholder shall have power to proceed against a *ryot* for the recovery of rent by distraint and sale of his movable property or by sale of his holding under Chapter VI unless he shall have exchanged a *patta* and *muchilika* with such *ryot* or tendered him such a *patta* as he was bound to accept or unless a valid *patta* or *muchilika* continues in force." S. 54 provides for the tender of *patta*. It declares: "The tender of a *patta* may be made to the *ryot* in the manner provided for the service of notice under sub-S. 2 of S. 78, or if the Collector on the application of the landholder shall so permit, in respect of any estate or any portion of an estate, by filing it in the office of the Collector or such other officer as the Local Government may by general or special order direct." S. 78, which deals with the service of written demands on defaulters at the time when distraints are made, provides in Sub-S. 2 as follows:—"The demand and account shall be dated and signed by the distrainer and shall, within one year from the date on which the arrear became due, be served upon the defaulter by delivering a copy to him or to some adult male member of his family at his usual place of abode, provided that it is in the neighbourhood of the land to which the distress refers, or to his authorized agent, or, when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of the land to which it refers." S. 112, which deals with the sale of *ryot's* holdings, provides that a notice of the intention to sell may be served "by delivering a copy to the defaulter or to his authorized agent, or to some adult male member of his family at his usual place of abode, or, if such service cannot be effected, by affixing a copy thereof on some conspicuous part of his last known residence, if he has any within ten miles of the holding, or on some conspicuous part of the holding." That these are ampler provisions than those under S. 78, may be seen by the fact, that S. 78 does not provide for affixing copy of the notice to the defaulter's residence as S. 112 does, and S. 112 defines when the place of abode is in the neighbourhood by limiting neighbourhood to a distance within ten miles of his holding. We are here concerned in considering not whether the processes for distraint and sale were properly effected, but whether there was a proper preliminary tender or *patta*. In Ss. 54 and 78 of the present Act, the provisions of Ss. 7 and 39 of Act VIII of 1865 have been to some extent repealed, for S. 7 declares a tender of *patta* "shall be sufficiently evidenced by such proof of service as is provided for by S. 39, in the

case of notice;" and S. 39 provides for the service of notice, by "delivering a copy to the defaulter or to some adult male member of his family at his usual place of abode, or to his authorised agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of his last known residence or on some conspicuous part of the land to which it refers. The only apparent differences are the use of the word "shall" instead of "may" in S. 7, the insertion of the words in S. 39, which allow a copy of the notice to be affixed to the defaulter's residence and the treatment in S. 7 of the prescribed formalities as evidentiary rather than directory. Under Regulation XXX of 1802, which was the law until Act VIII of 1865 was passed, it was necessary for the landholder to offer the *patta* itself in the presence of witnesses before he could bring a suit to compel its acceptance.

The principal questions for decision here are, what meaning is to be attached to the word 'delivering' in S. 78, and when it may be said to be effected and when it may be said that "such service cannot be effected." In O. 5, R. 16, of the Civil Procedure Code, corresponding to S. 79 of the Act of 1882, the words 'deliver and tender' occur together. O. 5, R. 17, throws a side light on what is meant in S. 78, clause 2, of the Estates Land Act by the words "when such service cannot be effected." It mentions the two contingencies, (1) if the defendant refuses to sign the acknowledgment; (2) if he cannot be found; in both events it becomes necessary to affix a copy of the summons. Now, the Estates Land Act contains no provision for the serving officer obtaining the signature of a *ryot* who rufuses the tender of *patta*, but if we take a refusal to sign as meaning all that a refusal to accept tender means and something more, viewed in this light, S. 78 seems to indicate that something else remains to be done by the serving officer beyond merely offering the *patta* for acceptance.

Next, as regards the word 'deliver,' does it necessarily involve any reciprocal action on the part of another? In the American Cyclopædia of Law and Procedure. Vol. XIII, page 773, I find the word, 'deliver' has perhaps as many shades of meaning ascertained by judicial interpretation as any other term known to the law. In some connection, it "does not imply an act of the will on the part of some one else, nor an acceptance of anything." In Webster's Dictionary, the synonyms of 'deliver' are stated to be, "give forth, discharge, liberate, pronounce, utter," and as an example, one who "delivers" a package "gives it forth."

Ss. 54 and 78 read together show that a tender of *patta* may be made by delivering a copy to the defaulter. Although the serving officer may be said to "give forth" a *patta* when he delivers it, the section requires that he should deliver it *to the defaulter* and this, in my opinion, denotes a transfer of possession of the document. The action of delivering here cannot be completed by one person who delivers without involving a reciprocal action of another who receives.

I, therefore, concur in thinking that this second appeal must be dismissed with costs. Though the strictly legal view, which the District Judge has taken of the provisions of the Act, as they stand, has resulted in this case in the landholder losing his remedy by attachment in spite of the finding of two Courts that the *ryot* was well aware of the tender of *patta*, hard cases like this will become rare when the provisions of the Act became better understood, for parties will take care to comply with the exact wording of the sections, even if the formality of affixing the *pattas* to the land may entail a journey of some miles from the place of tender. The other appeals follow the result in this appeal.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 267

AYLING AND KUMARASWAMI SASTRI, JJ.

Kolakudi Veerama Reddi and *others*—Plaintiffs—Appellants.

v.

Vasudeva Reddi — Defendant—Respondent.

Second Appeals Nos. 348, 406 to 408 of 1913, decided on 17th November, 1914 against the decrees of Dist., Judge, Trichinopoly, in Appeal Suits Nos. 413, 414, 416 and 415 of 1911.

Madras Estates Land Act (1 of 1908), S. 78—S. 78 requires that Pattas should not only be

tendered or affixed to the house but must also be affixed to the land.

In order that a distraint under S. 78 should be valid, it is not enough to show that the *pattah* was either tendered to the tenant or affixed to his house. It must also be shown that it was affixed to a conspicuous part of the land. 21 I. C. 587, Foll. [P. 268, C. 1.]

C. V. Ananthakrishna Aiyar and *K. S. Ganesha Aiyar*—for Appellants.

V. Purushothama Aiyar for *T. R. Venkatarama Sastri* – for Respondent.

Judgment.—Following the decision in *Zemindar of Sivagiri* v. *Micheal* alias *Sankaralingam* (1), we must hold that mere offer of the *patta* to a tenant who refuses to accept it is insufficient, unless followed by affixment to a conspicuous part of the land. The *pattas* in the present cases were admittedly affixed, not to a conspicuous part of the lands, but to the tenants' houses. The provisions of S. 78 of the Madras Estates Land Act have not been complied with, and the plaintiffs must be given decree for setting aside the attachments. Each side will, however, bear their own costs throughout.

S. N./R. K.

Petition allowed.

(1) (1913) 21 I. C. 587.

A. I. R. 1916 Madras 268

SADASIVA AIYAR AND NAPIER, JJ.

J. Subbier—Petitioner.

v.

M. Abboy Naidu—Respondent.

Civil Rev. Pet. No. 871 of 1913, decided on 9th Septembr 1915, against the proceedings of Dist., Judge, Madura, in Original Pet. No. 256 of 1913.

(a) Religious Endowment Act (20 of 1863), S. 10—For appointing a member, Court need not take evidence.

A District Judge, acting under S. 10 of the Religious Endowments Act, XX of 1863, is not bound to take evidence before appointing a person to the vacancy of a member of the Devasthanam Committee. [P. 269, C. 2.]

(b) Civil P. C. (5 of 1908), S. 141—(Per Sadasiva Aiyar, J.)—Rule 94 of Madras Civil Rules of Practice so far as it goes beyond S. 141 is *ultra vires* Rule 94 cannot make procedure of suits applicable to all petitions in its entirety.

Per *Sadasiva Aiyar, J.*—R. 94 of the Civil Rules of Practice (Mofussil) in so far as it goes beyond S. 141, Civil Procedure Code, 1908, is *ultra vires* and in so far as it is in conformity with the said section is unnecessary. [P. 269, C. 2.]

The omission in R. 94 of the Civil Rules of Practice (Mofussil) of the qualifying words 'as far as it can be made applicable,' occurring in S. 141, Civil Procedure Code, 1908, cannot make the procedure in regard to suits applicable in their entirety to all original petitions, if by the very nature of such petitions portions of the procedure relating to suits cannot be made applicable to such petitions. [P. 269, C. 1 & 2.]

(c) Religious Endowments Act (20 of 1863), S. 10—(Per Sadasiva Aiyar, J.)—Nature of proceeding under S. 10—Recording of evidence is not obligatory—Order under S. 10 is subject neither to appeal nor to revision.

The nature of an application under S. 10 of the Religious Endowments Act, invoking the District Judge's power of appointment to the vacancy of a member of the Devasthanam Committee, makes that part of the procedure in the trial of suits which relates to the taking of evidence not obligatory on the District Judge, though there is nothing to prevent his taking such evidence. [P. 269, C. 2.]

Neither appeal nor revision lies against an order passed by a District Judge under S. 10 of the Religious Endowments Act, as it is informal in its nature and is one passed outside the Ordinary Civil Jurisdiction of the District Court.. [P. 269, C. 2.]

(d) Religious Endowments Act (20 of 1863), Ss. 8 and 10—Qualifications provided by S. 8 are necessary in appointment under S. 10—Remedy for improper appointment is by injunction.

The qualifications contained in S. 8 of the Religious Endowments Act, regarding Committee Members apply to vacancies filled up under S. 10 of the said Act. [P. 270, C. 2.]

A person improperly appointed under S. 10 can be removed either by proceedings by *quo warranto* or by injunction. [P. 270, C. 2.]

(e) Civil P. C. (5 of 1908), S 141—(Per Napier, J.)—Neither S. 141 nor R. 94, Civil Rules of Practice applies to order under S. 10 of Religious Endowments Act.

Per *Napier, J.*—Neither S. 141, Civil Procedure Code, 1908, nor R. 94 of the Civil Rules of Practice (Mofussil), applies to proceedings under S. 10 of the Religious Endowments Act. [P. 271, C. 2 & P. 272, C. 2.]

(f) Religious Endowments Act (20 of 1863), S. 10—(Per Napier, J.)—Proceedings under S. 10 are not subject to revision under S. 115, Civil P. C.—Quære—Whether High Court can interfere with order under S. 10.

Proceedings under S. 10 of the Religious Endowments Act are not judicial proceedings, and they do not amount to a 'case' within the meaning of S. 115, Civil Procedure Code. [P. 271, C. 2.]

Quære.—Whether an order passed by a District Judge under S. 10 of the Religious Endowments Act, appointing a person to a vacancy in the Devasthanam Committee can be revised by the High Court. [P. 271, C. 2.]

(g) Letters Patent (Madras), S. 15—High Court will not readily interfere with lower Court's considered order.

A High Court will not under S. 15 of the Charter Act interfere with a carefully considered order of a lower Court. [P. 272, C. 2.]

T. R. Ramachandra Iyer and *T. R. Krishnaswami Iyer*—for Petitioner.

S. Srinivasa Iyengar and *K. Rajah Iyer*—for Respondent.

Sadasiva Aiyar, J.—This petition is instituted as a petition filed under both Ss. 115 and 141 of the Civil Procedure Code. S. 141 corresponds to the first paragraph of the old S. 647 and is as follows :—

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction."

Mr. T. R. Ramachandra Aiyar, who appeared for the petitioner, admitted during the course of the argument that this revision petition was not filed under both the Ss. 115 and 141 of the Civil Procedure Code, but only under S. 115, corresponding to old S. 622, and that S. 141 ought to have appeared in the third ground of the memorandum of the Civil revision petition and not in the title of the petition. The memorandum contains another mistake. As corrected, or rather fully expanded, the third ground, according to the contention of Mr. T. R. Ramachandra Aiyar, would be as follows :—

"The District Judge acted with material irregularity in not disposing of the original petition before him in accordance with the provisions of S. 141 of the Civil Procedure Code, and according to R. 94 of the Civil Rules of Practice, framed by the High Court under paragraph 2 of S. 652 of the old Civil Procedure Code, corresponding to S. 122 of the new Civil Procedure Code."

I do not think it is necessary to consider R. 94 of the Civil Rules of Practice as that rule, if it goes beyond S. 141, is *ultra vires* and so far as it is in conformity with it, it is unnecessary. While S. 141 contains the qualifying words "as far as it can be made applicable," these words are omitted in R. 94 of the Civil Rules of Practice. But such omission cannot make the procedure in regard to suits applicable in their entirety to all original petitions if by the very nature of such petitions portions of the procedure relating to suits cannot be made applicable to such petitions. It was on this ground that in a foot-note case in *Amdoo Miyan* v. *Muhammad Davud Khan Bahadur* (1), Subramania Aiyar and Davies, JJ., held that in respect of an application under S. 18 of the Religious Endowments Act, the ordinary procedure in suits as to giving notice to the other side and to taking evidence before deciding the case had no application, notwithstanding the terms of S. 647 of the old Civil Procedure Code (corresponding to present S. 141). So in the foot-note case in *Venkateswara, In re* (2), a Full Bench of five Judges held that notwithstanding S. 647, no appeal lay against an order passed under S. 18 of the Religious Endowments Act. I, therefore, agree with my learned brother that the nature of the application under S. 10 of the Religious Endowments Act invoking the District Judge's power of appointment to the vacancy of a member of the Devastanam Committee makes that part of the procedure in the trial of suits which relates to the taking of evidence by the Court not obligatory on the District Judge, though there is nothing, of course, to prevent his taking such evidence. I am further of opinion, for the same reasons as were given in the foot-note case in *Venkateswara, In re* (2), that not only are the provisions of the Civil Procedure Code as to an appeal inapplicable to an order passed under S. 10 of the Religious Endowments Act, but the provisions by way of revision are also inapplicable. In the Privy Council case in *Minakshi Naidu* v. *Subramanya Sastri* (3), their Lordships treat Ss. 14 to 20 of the Act as standing on a somewhat different footing from S. 10, and while the proceedings of the Court under Ss. 14 to 20 are treated as coming within the Ordinary Original Civil Jurisdiction of the District Court, an order of appointment under S. 10 is treated as outside the Ordinary Civil Jurisdiction. Hence the appointment order under S. 10 is much more informal than the decision given under any of the Ss. 14 to 20. In the case in *Somasundara Mudaliar* v. *Vythilinga Mudaliar* (4), the question whether the High Court could interfere under S. 622 of the old Civil

(1) (1901) 24 Mad. 685.
(2) (1887) 10 Mad. 98.
(3) (1888) 11 Mad. 26.
(4) (1896) 19 Mad. 285.

Procedure Code with an order under S. 5 of the Act XX of 1863 appointing a temporary manager, seems not to have been argued and was not considered in the judgment. As the petition in revision was dismissed on the merits, that case cannot be treated as an authority for the proposition that the High Court had jurisdiction to interfere in revision under S. 622 with an order passed under S. 5.

As regards the case *Gopala Ayyar* v. *Arunachallam Chetty* (5), the preliminary objection seems to have been taken in that case that no revision lay, but that was overruled. It was the decision of a single Judge, and though entitled to the greatest respect, it is not binding on us, especially as even on the merits, interference in revision was refused in that case also.

Coming to the case in *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam* (6), apart from the fact that that decision is now under appeal to the Privy Council, the order revised in that case under S. 115, corresponding to old S. 622, was *not an order of appointment* by the District Judge under S. 10 of the Act XX of 1863, but was an order passed by him accepting the result of an election held invalidly by the temple committee, such acceptance being treated as entitling the elected person to be a committee member. Mr. T. R. Ramachandra Aiyar however, argued that if the High Court has no jurisdiction to interfere with an appointment under S. 10, grave injustice might result as the District Judge might appoint a European or Christian gentleman as the member of a committee of a Hindu Devasthanam. He even went so far as to say that a popular religious rebellion might be the result of such an appointment and that hence a power of revision is necessary in the High Court. I do not intend to deny the right of the learned Vakil to put his case as strongly as possible, but one might venture to doubt whether, when there was not the slightest inclination on the part of the ordinary Hindu public to raise any objection to the control of the secular affairs and even festivals of Hindu Devasthanams by European gentlemen, who were members of Revenue Boards and Collectors, till Christian Missionary agitation brought about their withdrawal from such management (the Hindu public on the other hand being satisfied and even gratified with such official control), the appointment of one of several members of a temple committee by the District Judge (who has the best means of knowing the local opinions and feelings) of a European (official or even non-official), known for his tolerance and sympathy, could lead to such dire results as predicted by Mr. Ramachandra Aiyar, notwithstanding the existence of a very few persons) here and there in all countries (whether religious persons or irreligious persons) who entertain an unreasoning hatred (as opposed to the common mild dislike) of everything and everybody foreign. But unless a District Judge was phenomenally ignorant of law or perverse, the question as to what is to be done if a Christian, actively hostile to the Hindu religion, is appointed, cannot arise, as S. 8 of the Act XX of 1863 clearly provides that "the members of the said committee shall be appointed from among persons professing the religion for the purpose of which the mosque, temple, etc., was founded or is maintained," and though that section relates to the first appointment of committee members by the Local Government after the passing of the Act, the clear intention of the Act seems to be that when vacancies are filled up under S. 10, the qualification for membership prescribed in S. 8 will continue to apply. If against the clear intention of the Act as signified by S. 8, the District Judge appoints a bigoted Christian gentleman to fill a vacancy, their Lordships suggests in *Minakshi Naidu* v. *Subramanya Sastri* (3) that it may be that the person so improperly appointed "could be removed by proceedings equivalent to proceedings by *quo warranto* in England." (It may be that an injunction suit might also lie). But I might put another case which is far more likely to occur, namely, the District Judge might appoint a very bigoted Vaishnavite as a committee member for a Saivite Temple or a very bigoted Tengalai sectarian for a Vadagalai Devasthanam. We know that sectarians of the same religion sometimes hate each other more than they hate an alien religionist. It was this danger that this High Court wanted to prevent by their attempt at interference in the case in *Minakshi Naidu*

(5) (1903) 26 Mad. 685.
(6) (1915) 38 Mad. 594=21 I. C. 451.

v. *Subramanya Sastri* (3). Turner, C. J., and Muthuswami Aiyar, J., say (see page 29) that the order appointing Minakshi Naidu as a committee member of the Madura Minakshi Sundareswarar Devasthanam (a Saivite institution) ought to be set aside "because he" (Minakshi Naidu) "has pronounced himself actively in favour of the cult of Vishnu." But their Lordships of the Privy Council did not accept Mr. Doyne's contention that a person, "very improper and unfit, by reason of his religious qualifications or moral conduct, might be appointed by the District Judge and that there must be a right either by appeal against the Judge's order or by suit or in some other way to remove the person so appointed." In that case, no doubt, the question directly in point was whether there was a right of appeal against the order of appointment. But the reasons given by their Lordships to veto the right of appeal also apply in full force to the right of interference by way of revision. If I understand the report of the arguments in that case rightly, Mr. Doyne, who appeared against Minakshi Naidu before the Privy Council seems to have referred to the powers of the High Court under S. 622 (the revision section in the old Code) during the course of his arguments as justifying the High Court's interference with the District Judge's order of appointment (see page 31 of the report and their Lordships do not refer to that section; they say generally that "there was an *inherent incompetency* in *the High Court* to deal with the question brought before it."

I would, therefore, dismiss the petition with costs.

Napier, J.—This is a petition under Ss. 115 and 141, Civil Procedure Code, to revise the proceedings of the District Judge of Madura making an appointment to fill a vacancy in a temple committee, the ground for revision being an alleged material irregularity in the procedure of the Judge in that he did not proceed with the case in accordance with rule 94 of the Civil Rules of Practice and also did not take evidence. It is common ground that it is not the practice to apply R. 94 and that this procedure followed by the District Judge is the usual one and has never been challenged before. In reply, it is urged by Mr. S. Srinivasa Aiyangar that the High Court has no jurisdiction to interfere and that R. 94 does not apply to such proceedings as these. As to the right to revise, there are some reported cases of the exercise of this power, *Somasundara Mudaliar* v. *Vythilinga Mudaliar* (4), *Amdoo Miyan* v. *Muhammad Davud Khan Bahadur* (1), *Gopala Ayyar* v. *Arunachallam Chetty* (5), *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam* (6), but Mr. S. Srinivasa Aiyangar seeks to distinguish them on two sets of grounds, namely, (1) that proceedings under Ss. 5 and 10 of the Act stand on a different footing to those under Ss. 14, 16 and 18 and (2) that where the Court has interfered under the above sections, it has been on a preliminary legal question giving rise to the exercise of the jurisdiction. For reasons that will appear later I feel the force of the first distinction, but I am unable to accept the latter and think that if we are to uphold his contention that no revision lies, we must hold that *Somasundara Mudaliar* v. *Vythilinga Mudaliar* (4), *Gopala Ayyar* v. *Arunachallam Chetty* (5) and *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam* (6) are wrongly decided. Mr. S. Srinivasa Aiyangar was quite prepared to argue that they are wrong, relying on the decision of the Privy Council in *Minakshi Naidu* v. *Subramanya Sastri* (3). I have to observe that in each of the three cases *Minakshi Naidu* v. *Subramanya Sasiri* (3) was relied on and in one case this point was not taken and in the other two it was overruled by the Court. I desire to express no decided opinion on the point myself as I think the petition fails on the second point, but I have the gravest doubts whether these proceedings are a "case" within the meaning of S. 115. In my view R. 94 is inapplicable in proceedings under S. 10 of the Act. These rules are made under the Civil Procedure Code, under a number of special Acts, and under all other powers of the High Court. The Religious Endowments Act is not one of the Special Acts, for it contains no provision for the making of rules. It is sought, however, to find the power in S. 141 of the present Code, but to invoke the aid of that section, we have to ascertain first whether the procedure in the Code *can* be made applicable. This must depend on the nature of the proceeding and the

materials on which the order or decision is to be based. I do not think that R. 94, read with the definitions in R. 4 (8) and (9), carry us any further. It is urged that under the old rules, there were no such definitions as appear in R. 4, although both sets of rules were made under the same Code, which contains S. 647 in the same terms as S. 141 of this Code and though the rule-making power existed under S. 652, and that, therefore, the necessity for an original petition could not have been insisted on prior to 1905: but this argument is hardly permissible, as the High Court may have intended to extend the scope of the rules in 1905. I think that what we have to decide is as stated above and that we must look at the Act in light of the decision of the Privy Council to decide whether S. 141 makes the Code or any rules made under the Code applicable to these proceedings. Now *Minakshi Naidu* v. *Subramanya Sastri* (3) clearly decides one thing, namely, that there is no "Civil suit" in proceedings under S. 10 and that the order is not a decree within the meaning of the Code of 1879, which first introduced the language now adopted, with slight modification. The Privy Council, dealing with the exercise of the powers under S. 10, calls it "the right of appointing a member of the committe." This phrase seems to me indicative of its nature. It is not a right to apply nor a duty of the Court to appoint, and it is not a matter of "Ordinary Civil Jurisdiction." These phrases used by the Privy Council seem to me to be inapt for judicial proceedings. Again, the Privy Council clearly identify the Court with the Judge, saying so in so many words. Then how is the right to be exercised? It is "discretionery": that may not carry the matter very far; but it is to be exercised by "a person who has the *best means* of knowing the movements of local opinion and feeling." If the Privy Council meant that the selection is to be made on these considerations, the petition must obviously fail, for there can obviously be little use of sworn evidence when the Judge *has* to apply what he could *not* use in ordinary proceedings, his own knowledge by hearsay, repute or otherwise of local opinion and feeling. I venture very respectfully to say that this test is to be gathered from the terms of the section. The appointment is to be filled up primarily by election; failing that, by selection either by the Committee or by the Judge. Election and selection by the Committee are surely intended to procure the person most desirable according to the local opinion and feeling. Again, S. 8 lays down that the committee members are to be appointed "as far as can be ascertained in accordance with the general wishes of those interested." It seems to me that these words are but reproduced in another form in the language of the Privy Council. No evidence is taken by the Committee in selecting. Why should evidence be taken by the Judge? No procedure is laid down for the Committee and none for the Judge and yet the Legislature was careful to provide the procedure when dealing with arbitration under S. 17 and sanction to sue under S. 18 (*Vide* also S. 14, power to direct special performance). For the above reasons I am clear that no part of the procedure in a suit is applicable and that, therefore, S. 141 of the Civil Procedure Code and the Rules of Practice do not affect these proceedings. We are asked to interfere under the Charter Act and obviously when the Judge has, as in this case, carefully considered the rival claims such an application could not be contemplated by the petitioner. I would dismiss this petition with costs.

S. N./R. K.

Petition dismissed.

A. I. R. 1916 Madras 272

OLDFIELD, J,

Sadini Kondayya—Plaintiff—Petitioner.

v.

Kosagani Pedaswamy and *another*—Defendants—Respondents.

Civil Revn. Petn. No. 71 of 1914, decided on 4th November 1914, against the decree of Dist., Munsif, Kovur, in S. C. No. 20 of 1913.

Contract Act (9 of 1872), S. 23—Promissory note for consideration of transfer of right to sell toddy is unenforceable—Madras Abkari Act (1 of 1886), S. 22.

A promissory note given in consideration of the transfer of a right to sell toddy prohibited under S. 22 of the Madras Abkari Act (I of 1886) is unenforceable, as being for an illegal consideration. [P. 273, C. 1.]

B. Narasimha Rao—for Petitioner.
V. Ramadoss—for Respondents.

Judgment.—The lower Court dismissed the suit on the ground that the suit promissory note was not enforceable, being given as part of a contract forbidden by Act I of 1886.

There is no doubt that the note was given as consideration for the transfer to the defendant of the plaintiff's rights under a toddy lease. It is urged that such a transfer is permitted by S. 22 of the Act and that the question whether the plaintiff obtained a license from the defendant does not arise in this connection, but could arise only in connection with the latter's enjoyment of the right transferred to him. It is clear that in this case the transfer to the defendant was intended to be absolute and that it was not conditional on any further license in his name being obtained. The lower Court has found this and it appears from the terms of Exhibit I and the plaintiff's statement made after the lease had terminated. In these circumstances there can be no doubt as to the character of the transaction between the parties or as to the correctness of the lower Court's finding that the consideration for Exhibit A was illegal. The civil revision petition fails and is dismissed with costs.

S. N./R. K.

Petition dismissed.

A. I. R. 1916 Madras 273

SANKARAN NAIR AND TYABJI, JJ.

Rabia Bi—Plaintiff—Appellant.

v.

Angappan and *another*—Defendants—Respondents.

Second Appeal No. 560 of 1914, decided on 26th February, 1915, from the decree of Tempy., Sub. Judge, Trichinopoly in Appl. Suit No. 535 of 1912.

(a) Mahomeden Law—Guardian—Father-in-law is not legal guardian of minor girl.

Under the Muhammadan Law, a father-in-law is not a legal guardian of his minor daughter-in law. [P. 273, C. 2.]

(b) Mahomaden law—Guardian—*De facto* **guardian cannot alienate property for purchase of another property though beneficial—Mortgage by** *de facto* **guardian is not binding but property purchased must be released.**

A *de facto* guardian of a Muhammadan minor is not entitled to mortgage the minor's properties for purchasing other properties for her, even though the same may be beneficial to her. [P. 273, C. 2.]

Therefore a mortgage so executed is not binding on her but if she disclaims liability to pay the mortgage amount, she must give up her rights to the property purchased. [P. 273, C. 2.]

Muhammad Ibrahim Sahib—for Appellant.

S. Parthasarathi Iyer—for Respondents.

Judgment.—The plaintiff sues to set aside a mortgage of her properties effected by her father-in-law. Her suit was dismissed on the ground that the mortgage was effected for necessary purposes.

The Subordinate Judge finds that the father-in-law was not her guardian under the Muhammadan Law, but he was really managing her affairs: we agree with his finding. He also finds that he purchased certain properties under Exhibit IV for the plaintiff. The purchase was in his opinion beneficial to her, as she is a *gosha* lady. To raise money for the purchase the father-in-law executed the mortgage now sought to be set aside.

We are of opinion that a person who is not a minor's guardian in law but only a *de facto* guardian, is not entitled to mortgage the minor's property to purchase a house for her for the purpose alleged. It is true that it might be more convenient to her to have more space to move about without being observed by strangers. But for this purpose her guardian cannot charge the minor's property.

At the same time it is clear that she cannot retain the property purchased out of the funds so raised, and she says she lays no claim to it and is prepared to execute any conveyance if necessary. The mortgagee is willing to take a conveyance. We, therefore, set aside the decree of the lower Appellate Court and declare that the mortgages, Exhibits I and II, are not binding on the plaintiff and she is entitled to recover possession of the property in schedule II with mesne profits past and future at Rs. 25 a year from 1908. We further direct the plaintiff to execute a conveyance of the properties purchased under Exhibit IV in favour of the 12th defendant and if in possession, to surrender the property to the 12th defendant. The appellant will get her costs in this Court.

In the lower Courts the parties will bear their own costs.

S. N /R. K.

Appeal allowed.

A. I. R. 1916 Madras 274

SADASIVA AIYAR AND NAPIER, JJ.

Venkiah Amma Row Bahadur—Plaintiff—Appellant.

v.

Official Assignee of Madras—Defendant—Respondent.

Appeal No. 46 of 1913, decided on 2nd February, 1915, from the Original Judgment of Bakewell, J., dated 22nd April 1914.

Presidency Towns Insolvency (Act 3 of 1909), S. 52—Sovereigns and gold entrusted for converting into jewellry—Jeweller becoming insolvent—Jeweller was trustee as it was a bailment—But sovereigns or gold cannot be traced claimant could not get any preferential treatment but must rank with other creditors.

Where a jeweller, who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt.

Held, that the transaction between the claimant and the jeweller amounted to a bailment and the jeweller became, in consequence, a trustee for the claimant in respect of the sovereigns and gold entrusted to him; [P. 274, C. 2.]

Held, further, that inasmuch as there was no evidence that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the claimant was not entitled to the benefit of the doctrines of tracing and *quasi* charge and, therefore, to any preferential payment, but was only entitled to rank *pari passu* with other creditors of the insolvent.

In re *Hallett's Estate*, 13 Ch. D. 696; *Sinclair* v. *Brougham*, (1914) A. C. 398, foll.

Harriz v. *Truman*, 51 L. J. Q. B. 338; *Ex parte Kelley and Co.*, 11 Ch. D. 306; *In re Oatway Hartslet* v. *Oatway*, (1903) 72 L. J. Ch. 575; *Frith* v. *Cartland*, 2 H. & M. 417; 33 Mad. 299; ref. to. [P. 276, C. 2 & P. 277, C. 1.]

M. D. Devadoss for *M. K. Ramaswami Iyer*—for Appellant.

Sidney Smith—for Respondent.

Facts.—This is an appeal under the Presidency Towns Insolvency Act, III of 1909, against an order of the Commissioner in Insolvency dismissing the notice of motion taken out by the appellant claiing to rank as a preferential creditor.

The appellant gave the insolvent forty-five sovereigns and some gold for being made into a gold *oddiyanam* (waist ornament). The insolvent did not make the ornament, but used the sovereigns and gold "for his own purposes for other work." The appellant claimed that there was an entrustment of the sovereigns and gold to the insolvent, that the latter was, therefore, a trustee or a bailee for him, that he was in consequence a preferential creditor, entitled to follow the estate and to have his claim for the value of the sovereigns and gold satisfied in full out of the estate in the hands of the Official Assignee.

Bakewell, J., who heard the application, sitting as a Commissioner in Insolvency, held that the insolvent did become a bailee for the claimant but that as it was impossible to trace what became of the sovereigns and gold, the latter was only entitled to rank *pari passu* with other creditors. The claimant then preferred this appeal.

Sadasiva Aiyar, J. This is an appeal by a creditor whose notice of motion was dismissed by Mr. Justice Bakewell in the exercise of insolvency jurisdiction. The creditor (appellant) contended that he was entitled not merely to get a rateable distribution along with the other creditors, but that he was entitled to get the full amount due to him by the insolvent in perference to the other creditors of the insolvent (from and out of the insolvent's estate) inasmuch as he gave 45 sovereigns and 26½ *pagodas* weight of gold for the specific purpose of making a gold *oddiyanam* and 4 *mettus* by working the specific gold in the said sovereigns and the said gold bar, and as the relation between the insolvent and himself was one of bailment and not that of creditor and debtor in an ordinary loan transaction.

The learned Judge found (*a*) that the insolvent did become bailee of the specific gold given to him as metal and that there was not the relation of ordinary creditor and debtor created (by the giving of the sovereigns and the gold to the insolvent) between the petitioner and the insolvent; (*b*) that it was impossible "to have this specific gold," now that "it does not even appear that at the date

of the insolvency, the insolvent was possessed of any sovereigns or bar gold with which the applicant's property might have been mixed," and that the sovereigns and the gold have "disappeared and cannot be followed." On these findings the learned Judge held that the petitioner, even taking him to be a *cestui que trust* and taking the insolvent as a trustee, had no greater right over the general property of the trustee than the other creditors have. In arriving at this conclusion, the learned Judge states that he followed the principle laid down in In re *Hallett's Estate* (1).

The contentions before us in appeal are (1) that the appellant was entitled to preferential payment on the finding that the insolvent was a trustee and 2) that the Official Assignee has not denied the presence of gold and ornaments at the time of the failure of the insolvent's firm among the assets of the firm. (See 6th ground).

I might at once say that I accept the findings of fact arrived at by the learned Judge, though each side attacked that portion of the finding which was against it. Mr. Smith, for the Official Assignee, contended that the oral evidence established that the sovereigns and the gold given by the petitioner were not themselves intended to be wrought into the jewels, but that the price of those sovereigns and gold was to be treated as if the price was given in current cash on the insolvent's promise to give certain jewels of the same value to the petitioner. I think that the terms of the contract between the parties, as reduced to writing in Exhibits A and A2, clearly support the learned Judge's finding. On the other side, the appellant contended that the gold in the sovereigns and in the bar given by him could be traced to some jewels which were taken possession of by the Receiver and afterwards by the Official Assignee. There was no such proof adduced before the learned Judge and it is impossible to find that in the assets taken possession of by the Receiver or by the Official Assignee either the gold or the value of the gold due to the insolvent could be at all traced.

Accepting then the facts as found, what is the law on the point? I have considered to the best of my ability the arguments advanced on both sides in this case and also the decisions quoted. Those cases include In re *Hallett's Estate* (1), *Harris* v. *Truman* (2), *Ex parte Kelley & Co.* (3), the very recent case of *Sinclair* v. *Brougham* (4) in the House of Lords, where the whole question has been elaborately considered and the case In re *Oatway*; *Hertslet* v. *Oatway* (5). I have also considered the six well-known Arbuthnot & Co. cases reported as *Official Assignee of Madras* v. *Smith* (6), *Official Assignee of Madras* v. *Ramachandra Iyer* (7), *Official Assignee of Madras* v. *Lupprian* (8), *Official Assignee of Madras* v. *Krishnaswami Naidu* (9), *Official Assignee of Madras* v. *Rajam Iyer* (10) and the last case on appeal in *Official Assignee of Madras* v. *Rajam Iyer* (10).

Taking the pronouncement of the Lord Chancellor in the recent House of Lords case as enunciating the binding law on this point, I think it establishes (1) that where the moneys of *A* get into the hands of *B* (who afterwards becomes an insolvent or if *B* is a Society or Company whose affairs are in liquidation) and where the relation of creditor and debtor by *contract or quasi-contract* cannot be established between *A* and *B*, *A* can recover his moneys preferentially on the principle of "tracing" in two cases, (*a*) where *A*'s money can be earmarked in the hands of *B* (as where the money of *A* was contained in a bag and the bag with the contained money in specie could be identified); (*b*) where any particular asset was purchased by *B* with that money, if that particular asset is capable of being earmarked as purchased with that money. (2) That case further establishes that where the money of *A* was mixed by *B* with his own money in *B*'s Bank and appropriated by *B* and there is or can legally be no contract or *quasi*-contract by *B* establishing the ordinary relationship of creditor and debtor, there is what is called loosely a "charge" in *A*'s favour on the balance of all the moneys found in the Bank to the credit of *B* (at the time of *B*'s insolvency or liquidation)

(1) (1880) 13 Ch. D. 696.
(2) (1882) 9 Q. B. D. 264.
(3) (1879) 11 Ch. D. 306.
(4) (1914) A. C. 398.
(5) (1903) 2 Ch. 356.
(6) (1909) 32 Mad. 68=1 I. C. 712.
(7) (1910) 33 Mad. 134=5 I. C. 974.
(8) (1910) 33 Mad. 145=5 I. C. 312.
(9) (1910) 33 Mad. 154=5 I. C. 331.
(10) (1910) 33 Mad. 299=6 I. C. 380

to the extent of the money which is due to *A*, and that charge entitles *A* to be preferentially paid out of those moneys, preferentially to ordinary creditors.

The whole law upon the point seems to have been developed from the observations of Vice-Chancellor Wood in *Frith* v. *Cartland* (11), and had its origin in the principle that a *cestui que trust*, if he can trace the trust property to a fund standing in the name of the trustee or to an asset in the hands of the trustee, should be preferentially paid out of that fund or out of that asset. In the 1914 case in the House of Lords, the doctrine of "tracing" was extended in favour of the persons who did not stand in the relation of *cestui que trust* (even in the limited sense of bailors or principals), provided that they cannot be treated as creditors under even a *quasi*-contract or implied contract.

The majority of the Judges in In re *Hallett's Estate* (1) held that the rule in *Clayton's* case (12) as to the appropriation of cheques drawn upon a Bank to the moneys deposited there in order of dates was not applicable where the dispute is between the Official Assignee of a trustee *B* and the *cestui que trust A*, whether a balance in the Trustee's Bank is or contains the trust money belonging to *A*. Thesiger, L.J., dissented from the view of the majority which held that the rule was not applicable and that the balance should be traced to the trust money, though cheques had been for the full amount of the money, in priority to cheques affecting subsequent deposits to the trustee of his own moneys. The House of Lord's case has left this second question undecided.

The necessity of tracing what I might roughly call the misappropriated funds into the assets in the hands of *B* (of so tracing it, at least in an indirect manner and by reasonable presumptions), has not been questioned in this latest case. The Lord Chancellor seems even to lay down in one portion of his judgment that it lies upon *A* to establish by evidence that the assets in the hands of *B* do or must contain funds belonging to him. [*Sinclair* v. *Brougham* (4). See also the argument in the same case at page 406, proposition 3, in which the learned Counsel says "the burden of proving the identity is on the person who alleges it]". The burden of proof may be discharged by a sort of eliminating process, that is, *A* might establish that the remaining securities, investments and assets in the possession or name of *B must* be the result of the use of *A*'s funds. In that same case, their Lordships held on the facts that the funds in the hands of *B* (a statutorily constituted society), which received the moneys from the depositors on *ultra vires* transactions, must have contained the said moneys of the depositors and the increase of those moneys and hence their Lordships had no difficulty in applying the doctrine of tracing in that case, especially as the claims of ordinary outside creditors had been fully discharged.

In the case of *Harris* v. *Truman* (2) and In re *Oatway*, *Hertslet* v. *Oatway* (5) also, the necessity of *A*'s establishing that his property, whether it was money or chattels or the proceeds of his chattels, was or must form a part of the whole of the assets or funds in the hands or name of *B*, was not denied. In the former case, though the assets (in the shape of barley and malt) were not purchased with *A*'s moneys which had been misappropriated by *B* (A's agent employed expressly to purchase barley and malt for *A*), *B* did make those purchases for *A* in order to fulfil his obligation as agent to *A* to so purchase barley and malt for *A* and in those circumstances, *A* was held entitled to ratify the appropriation by his agent (though that appropriation was made to conceal his breach of trust) and to treat his (*A*'s) moneys as traced to the barley and malt purchased with the other moneys of *B*. If, in this case, I could have found my way to decide that the assets taken possession of by the Receiver or by the Official Assignee did include or must have included the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, or that though the petitioner's particular gold was misappropriated by the insolvent, he made *oddiyanams* or *mettus* with other gold [as in the case in *Harris* v. *Truman* (2) *in order to fulfil his obligations to the petitioner*, I would be inclined to apply the

(11) (1864) 2 H. & M. 417.
(12) 1 Mer. 572.

doctrine of "tracing" and the doctrine of *quasi*-charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lord's case; but I do not see my way to differ from the finding of Mr. Justice Bakewell (which I take to be) that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Receiver or by the Official Assignee, and I must, therefore, confirm the order of the learned Judge which held, that the petitioner must be treated as a man who had lost the gold entrusted by him to the insolvent, just as if the insolvent had converted it into cash and squandered it in unknown ways before his insolvency. On the finding, then, that none of the assets found with the insolvent is proved directly or even by remote fact, from which a reasonable inference could be drawn, to have contained any portion of the petitioner's gold or to have been acquired with the use of the proceeds of that gold, I must and do confirm the order of the learned Judge. But as it is a hard case for the appellant and as the legal question involved is an intricate one, which even the most learned English Judges have found it so difficult even to formulate for decision in all its subtle ramifications, I shall, while directing the appellant to bear his own costs in this appeal, not direct him to pay the respondent's costs, which will, of course, come out of the insolvent's estate.

Napier, J.—This is an appeal from an order of Mr. Justice Bakewell in Insolvency Petition No. 188 of 1912, rejecting an application for the return by the Official Assignee of certain sovereigns and bar gold given by the applicant to the insolvent for the purpose of making ornaments, or for payment of their value. The learned Judge finds on the evidence, and we agree with him in that conclusion, that the sovereigns and the bar gold were given as alleged for a specific purpose, that the insolvent, instead of obeying the directions, credited the applicant with the sovereigns as cash and used the gold for other work. There is no evidence to show what became of the sovereigns, nor is there any evidence that the jewel into which the bar gold had gone was in the possession of the insolvent at the time that a Receiver was appointed to take charge of his property, which was done sometime prior to the insolvency. The amount of the gold was 26½ *pagodas*, which is nearly 3 oz. On these facts the learned Judge has held that the applicant's property has disappeared and cannot be followed, and applying the law as laid down in In re *Hallett's Estate* (1), dismissed the application.

It was contended before us that the appellant could recover as a preferential creditor on the principle that if the estate has been benefited by the transaction, the value of the specific moveable can be recovered. It is sufficient to say that there is no authority for this broad proposition.

It was next argued that the insolvent being a bailee of the specific gold, the applicant was entitled to follow it into any property possessed by the insolvent Reliance is placed on *Official Assignee of Madras* v. *Rajam Iyer* (10). That, however, is no authority for the proposition, that being a case where money stamped with the position of trust money was mixed with the insolvent's own money. During the course of the argument, I invited the attention of the learned Counsel for the appellant to the recent decision of the House of Lords in *Sinclair* v. *Brougham* (4), the well-known Birkbeck Bank case and he endeavoured to find support for the proposition in various passages in the judgment of the learned Lords. What he sought in effect to do was to apply the principle under which trust moneys, which were mixed, can be followed to specific moveables held by the insolvent. This case is no authority for that position. Their Lordships certainly re-affirm the proposition laid down in In re *Hallett's Estate* (1), that "where trust money has been mixed by an insolvent with his own moneys, the law will presume that any money drawn from that mixed account by the insolvent was his own money and that the balance remaining unexpended was the trust money." But with regard to specific moveables held by the insolvent as bailee, their Lordships state the law as already established, vide *Sinclair* v. *Brougham* (4): "If money in a bag is stolen and can be identified in the form in which it was stolen, it can be recovered in *in specie*. Even if it has been expended by the person who has wrongfully taken it, in

purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money." If it was possible to establish that these sovereigns and bar gold had been converted into any particular jewel, the appellant might claim that jewel. But admittedly this cannot be shown. There is nothing in In re *Oatway ; Hertslet* v. *Oatway* (5), inconsistent with this doctrine, which is clearly established in In re *Hallett's Estate* (1). The basis of the right to follow is stated to be that the claim is one *in rem* "the claim to follow and recover property with which in equity at all events they have never really parted." It is obvious that if the claim is *in rem*, the *res* must be ascertained. I am, therefore, clearly of opinion that the judgment of the learned Judge was right and must be affirmed. I agree with the order as to costs made by my learned colleague.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 278

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Sundarammal—Defendant—Appellant.

v.

V. Subramanya Chettiar and *others*—Plaintiffs—Respondents.

First Appeal No. 251 of 1912, decided on 15th December 1914, from the decree of Sub-Judge, North Arcot, in Original Suit No. 65 of 1911.

Negotiable Instruments Act (26 of 1881) S. 118—Burden of proof of consideration even on admission of execution held shifted to plaintiff.

Where in a suit, based upon three promissory notes executed by the 1st defendant who died pending the suit, and before evidence was gone into, it appeared that the promissory notes followed each other in quick succession, that the 1st defendant, a young man of reckless habits, was just emerging from his minority when he began his borrowing, that he in his written statement admitted having received only a portion of the consideration and that the plaintiff's accounts did not show that he had enough money to make such advances :

Held, that the circumstances were such as to shift the burden of proof and to throw upon the plaintiff the obligation of satisfying the Court that he had paid the consideration in full.

[P. 280, C. 2.]

K. Srinivasa Aiyangar and *C. A. Seshagiri Sastri*—for Appellant.

L. A. Venkata Raghava Aiyar and *L. A. Govinda Raghava Aiyar*—for Respondents.

Wallis, C. J.—This is an appeal from the decision of the Subordinate Judge of North Arcot giving judgment for the plaintiff in a suit on three promissory notes, which were executed by the 1st defendant who died before the trial. The Subordinate Judge has written a very careful judgment, and I do not find it necessary to dissent from any of the conclusions of fact at which he has arrived. He has decided the case on the ground that under the Negotiable Instruments Act, the burden is on the representative of the 1st defendant to show failure of consideration in whole or in part and he has observed in the course of his judgment that but for the burden of proof being this way he would probably, on account of the suspicious circumstances of the various transactions to which he refers, have decided the suit against the plaintiff except to the extent of the consideration admitted by the 1st defendant in his written statement. Farran, C. J., in *Moti Gulabchand* v. *Mahomed Tharia Topan* (1), held that the fact that the defendant in that case was a young man of extravagant habits who was kept out of the enjoyment of his property which was in the hands of a Receiver was sufficient to throw the burden on to the plaintiff. It appears to me that the facts of the present case are very much stronger than the facts in *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* (1), and that they have that effect. The 1st defendant was a young man of extravagant habits, who, though, as the Subordinate Judge finds, he was supplied by his family with abundant means for his maintenance borrowed in a very extravagant manner both from the present plaintiff and from others after he came of age, so that his elder brother was obliged to sue for partition. All the transactions in this suit took place before the 1st defendant obtained his share of the property on partition. The transactions with the present plaintiff fall under three heads. In the year 1906, the 1st defendant borrowed over Rs. 1,600 from the plaintiff and afterwards denied receipt of consideration. This put a stop to the transactions between the parties for sometime. But in 1908 they were resumed, and bet-

(1) (1896) 20 Bom. 367.

ween March 1908 and May 1908 the 1st defendant is said to have borrowed from the plaintiff a sum of over Rs. 6,000 on promissory notes which have been made the subject of separate suits. Lastly, we come to the plaint transactions, three promissory notes for Rs. 3,000, Rs. 3,400 and Rs. 3,000 which are said to have been borrowed in June, August and November 1908. So that between March and November 1908, the 1st defendant is said to have borrowed more than Rs. 15,000 from the plaintiff.

The Subordinate Judge has enumerated the various suspicious circumstances which attended these transactions, and I think it only necessary to refer to one or two of them as sufficient to shift the burden. The Subordinate Judge finds that the plaintiff has not means to make the advances shown in his accounts to the 1st defendant and his other clients. According to the plaintiff's own evidence his transactions with other clients were on a very small scale. He says that their total indebtedness to him was Rs. 3,000, whereas he purports to have made advances of no less than Rs. 15,000 in the course of these few months to the 1st defendant. The Subordinate Judge finds, and I agree with him, that the plaintiff's accounts do not show that he had enough money to make such advances. It is, of course, possible that these accounts may not fully represent his transactions and may have been prepared for the purpose of deceiving the income-tax authorities. In the course of cross-examination the plaintiff set up various false cases as to how he got the money. One absurd story he told was that he had sold all his wife's jewels for the purpose of getting money to make these advances to the 1st defendant. I think that is quite incredible. I do not believe the allegation of the 1st defendant in his written statement as to what he received on these promissory notes. On the other hand, I am equally far from believing that the plaintiff really advanced the whole of these amounts as he says. It seems to me that where the relation is such as that which existed between the plaintiff and the 1st defendant very little is needed to shift the burden.

The other evidence is fully dealt with by my learned brother in his written judgment, and it is sufficient for me to say the effect of that evidence is to shift the burden which was on the defendant to show that the full consideration of the promissory notes has not been paid, and that being so, judgment can only be given for the amounts which are admitted to have been received by the 1st defendant. The appeal must, therefore, be allowed and the decree will be modified accordingly with costs throughout.

Seshagiri Aiyar, J.—I have come to the same conclusion. The plaintiff sues on three promissory notes, Exhibits A, A1 and A2 executed by the 1st defendant on the 4th June 1908, 20th August 1908 and 11th November 1908 respectively. The 1st defendant pleaded that excepting small sums of money paid on the occasion of the registration of each of the three promissory notes, there was no consideration for them. He died pending the suit and before evidence was gone into. His widow has been brought on the record as his legal representative. The Subordinate Judge in a very careful judgment, in which he draws attention to all the salient features of the case, came to the conclusion that the burden of proof was upon the defendants and that it was never shifted on to the plaintiff, and upon that ground alone, although he was of opinion that there were many suspicious circumstances connected with the execution of the promissory notes, he gave a decree for the plaintiff as prayed for. The widow of the 1st defendant has appealed: I am unable to agree with the Subordinate Judge that in the circumstances of the case to which I shall presently refer the burden of proof was not shifted to the plaintiff.

The father of the 1st defendant died in 1900 leaving behind him the 1st defendant who was then a minor and another son, the step-brother of the 1st defendant. He died possessed of considerable property and on his death, their management passed into the hands of the 1st defendant's step-brother who was older in years. While the step-brother was managing the 1st defendant Appavu Chetty began to contract debts. The first transaction was about September 1906 when a promissory note was executed by Appavu for Rs. 2,000 in favour of the plaintiff in consideration of the latter transferring a deed of mortgage executed to him by a third party. No explanation has been given as to why Appavu was

saddled with the collection of a mortgage-debt and why he gave a promissory note in exchange. The mortgage which was transferred was for Rs. 1,200 and it was suggested that at the time of the promissory note, probably the amount of the principal and interest due on the mortgage amounted to Rs. 2,000. The deed itself has not been put in evidence. This is a very suspicious circumstance. The next promissory note was executed by Appavu to plaintiff on the 28th October 1906 for Rs. 476 carrying interest at 18 percent. per annum. Three days later, on the 1st November 1906, a third promissory note for Rs. 200 was given. Eight days after, a fourth for Rs. 450, and after three weeks on the 2nd December 1906 a fifth promisory note for Rs. 500 was executed, all bearing interest at 18 per cent. per annum. On the 4th January 1907 Appavu sent a registered notice, Exhibit R, through his Vakil to the effect that full consideration was not paid in respect of the fourth and fifth promissory notes and that he would not be liable for their payment. To this, a reply, Exhibit R1, was given on the very next day, saying that the contents of the notice were "highly surprising, fraudulent and shocking." The notice went on to say: "Further, you should pay me within 31st January 1907, the amount of the principal and interest due on the abovesaid (5) five promissory notes which you have executed in my favour, endorse payments on the respective bonds and obtain return of those. If you do not do so, suit will be filed at once in Civil Court and the amounts recovered with costs." In or about September 1907, the elder brother of Appavu filed a suit against the plaintiff for partition of the family properties, the apparent object being to relieve himself from liability for the debts which Appavu was recklessly contracting at this time. The suit itself terminated in a compromise, Exhibit IX, on the 15th October 1909. During the pendency of this suit, 1st defendant began to borrow further sums of money from the plaintiff. The borrowings are preceded by an abject apology, Exhibit S dated the 14th March 1909, for having given the notice, Exhibit R. Then on that very day, a promissory note for Rs. 675 was executed by the 1st defendant to the plaintiff. Four days, after, on the 18th March, a promissory note for Rs. 2,175 was executed. Twenty days after on the 10th April 1908, another for Rs. 2,000 was executed. Then we come to the suit promissory notes. The first of them was on the 4th June 1908 for Rs. 3,000, the second was on the 20th August 1908 for Rs. 3,400 and the third was on the 11th November 1908 for Rs. 3,000. These promissory notes following in quick succession naturally create a great deal of suspicion. It has to be remembered that, even according to the evidence of the plaintiff, 1st defendant Appavu was 21 years of age in 1908. When he began his borrowings in 1906 he had just emerged from his minority. He was a man of large expectations and was out of possession, because the management of the properties was in the hands of his brother. Those circumstances, in my opinion, shift the burden of proof on to the plaintiff and the facts that the executant is dead and that the plaintiff now seeks to recover the amount from a young woman, who admittedly has no knowledge of the circumstances under which the promissory notes were executed, make it more incumbent upon the plaintiff to prove that there was consideration for the promissory notes sued on. In *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* (1), Sir Charles Farran, Chief Justice, says:—"The defendant, when he executed the notes sued upon, was a young man who had only attained his majority nine months previously. He appears to have been of an extravagant and reckless character. He was entitled to a large amount of property under the Will of his father, the late Sir Tharia Topan of Zanzibar, but had not come into possession of it, as on account of family disputes it was, in common with the rest of the family estate, in the hands of a Receiver appointed by this Court. The plaintiffs are a Marwadi firm who are by profession money-lenders. These facts being admitted (apart from the technical rule laid down in S. 118 of the Negotiable Instruments Act), the ordinary presumption that a negotiable instrument has been, executed for value is so much weakned that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration

in full. This is, we think, the practical effect of illustration (*c*) to S. 114 of the Evidence Act, and its Explanation." In the present case also the plaintiff is a money-lender. It is also in evidence that Appavu was a man of reckless character and was leading a wasteful life. He denied consideration except to a small extent. Therefore the observations of the learned Chief Justice apply to the present case to their full extent. I think that the present case is even stronger than the case before the Bombay High Court. As I pointed out, the transactions began with a suspicious transfer of a mortgage document. Appavu was involved on litigation with his brother. On these additional reasons and having regard to the principles laid down by the learned Chief Justice, I have no hesitation in holding that the burden of proof is heavily on the plaintiff in this case to show that consideration passed for the plaint notes.

[NOTE:—The rest of the judgment is not material for the purposes of this report.—*Ed.*]

S. N./R. K.

Appeal allowed; Decree modified.

A. I. R. 1916 Madras 281

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Venkatachalam Chetty—Defendant—Appellant.

v.

A. N. R. M. Narayanan Chetty and *others*—(Plaintiffs) and Defendants—Respondents.

Second Appeal No. 184 of 1912, decided on 15th December 1914, against the decree of Tempy., Sub-Judge, Ramnad, in Original Suit No. 145 of 1910.

(a) Limitation Act (9 of 1908), Arts. 89 and 115—Art. 89 and not Art. 115 applies to suit against agent for money received and not accounted for—Money is moveable property under Art. 89.

As money is moveable property within the meaning of Article 89 of Schedule I of the Limitation Act, a suit by a principal against his agent for money received and not accounted for is governed by Article 89 of the Limitation Act and is barred if not brought within three years of the date of the termination of the agency. [P. 282, C. 1.]

An agent's contract to account to his principal, whether express or implied, is specially provided for in Article 89 of Schedule I of the Limitation Act and it cannot be included under Article 115 of the Act. 12 All. 541; 26 Cal. 715; diss. from. 14 Cal. 147 (P. C.); 5 I. C. 59; 24 All 27; (P. C.), Foll. [P. 283, C. 1.]

(b) Contract Act (9 of 1872), Ss. 201, 209 and 218—Liability to account is independent of agency continuing—Agency terminates on agent's handing over charge being required by principal.

An agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue. [P. 282, C. 2.]

Therefore, where an agent in obedience to a telegram sent by his principal hands over the charge to another person, his agency terminates that very day as his authority is revoked. [P. 282, C. 2.]

Per *Seshagiri Aiyar, J.*—In an agent's contract the fixing of a date for rendering accounts cannot stop the termination of the agency. [P. 284, C. 1.]

C. S. Venkatachariar—for Appellant.

C. V. Ananthakrishna Aiyar, K. V. Krishnaswami Aiyar and *N. Duraisawmy Iyengar*—for Respondents.

Wallis, C. J.—The first defendant was employed by the plaintiffs, a firm of Nattukkottai Chetties of Devakotta in the Ramnad District, to carry on business at certain places in Burma as their agent under the terms of a document, Exhibit A, known as a salary *chit* executed by the 1st defendant on his appointment. By this he undertook to carry on the business under the direction of the 1st plaintiff and stipulated that on bringing back the cash and accounts to Devakotta and rendering the same, he was to get back the salary *chit*. It is explained that in the case of these agents the return of the salary *chit* means that the agent has passed his accounts and that his conduct has been satisfactory. The present suit is brought by the plaintiffs for an account of his dealings, and the question is whether it is barred by limitation. The 1st defendant continued to represent the plaintiffs in Burmah after the expiry of the three years originally agreed upon, and the plaintiffs who were dissatisfied with his conduct had some difficulty in getting rid of him, as appears from the correspondence. As early as the 24th November 1906 they wired to him to give the keys, accounts, and a power to the 4th defendant who was to succeed him, and at length on the 2nd March 1907, having executed a power-of-attorney in favour of his successor apparently with a view to facilitate the collection of debts owing to the firm, he handed over charge to his successor, who

gave him Exhibit IV, a signed receipt, and a list of outstandings which were stated to have been checked, and also apparently Exhibits G and G1, certain further particulars signed by his successor, which he subsequently handed over to the plaintiffs at Devakotta.

He then received a sum of Rs. 200 for his travelling expenses and for sweets and other presents to be purchased for the principals. According to the evidence taken on commission for the plaintiffs, Exhibit VIII-A, this sum was not given as a loan, but he could do what he liked with it. It is customary to pay such sums to agents when they are returning. It is not very easy to reconcil this with the earlier statement made by the witness that if any surplus remained, it was to be handed over to the principal or an account rendered. On his arrival at Madras on the 19th March 1907, the 1st defendant wrote Exhibit H, and wired Exhibit H-1 to plaintiffs announcing his arrival and stating that he was coming in two days. According to the evidence for the plaintiffs, he came later and handed over Exhibits G and G1, but he never accounted for his agency or got back his salary *chit*.

The question then is, whether in these circumstances the suit is barred. It is now well-settled that money is moveable property within the meaning of Article 89 of the Limitation Act. That Article applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run "when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. The 1st defendant in the present case relies on the termination of the agency. Under S. 201 of the Indian Contract Act an agency is terminated, among other ways, by the principal revoking his authority, or by the agent renouncing the business of the agency. or by the business of the agency being completed, and it is from this point, under Article 89, that time is to begin to run in a suit by the principal for money received or not accounted for. Under S. 218 of the Indian Contract Act the agent is, no doubt, bound to pay the principal the sums received on his account, but it cannot be said that until he does so, the agency is not determined because the business of the agency is not completed, for the terms of Article 89 necessarily involve that the agency may be terminated before the payment is made, I am, therefore, with great respect, unable to agree with the observations, in *Babu Ram* v. *Ram Dayal* (1) and *Fink* v. *Buldeo Dass* (2), which do not seem to have been necessary for the decision as there were other grounds for holding that the agency had not been determined. The better view appears to be that the agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue.

Article 89 was worded in the present form for the first time in the Act of 1877, but in *Hurrinath Rai* v. *Krishna Kumar Bakshi* (3), a case under Act IX of 1871, their Lordships of the Judicial Committee observed that whether Article 60 or Article 90 or Article 118 of that Act applied, time must be counted from the day when the defendant ceased to discharge the duties of *dewan* by departing from the plaintiff's service. That was a case of termination of the agency by the agent renouncing the business of the agency within the meaning of S. 201 of the Indian Contract Act. The present would appear to be an equally clear case of termination of the agency by the principal revoking his authority and the agent handing over charge to his successor. I think that on the facts set out above, his agency was determined before he left Burmah and that as the suit was instituted more than three years later it is barred if Article 89 applies.

It is said, however, that under Exhibit A the 1st defendant was bound to return to Devakotta, hand over the money and accounts and pass his accounts, and that Article 89 is inapplicable as there was an express agreement that the 1st defendant should pass his accounts on his return. The plaintiffs rely on a decision in *Jogesh Chandra* alias *Dhala Ghose* v. *Benode Lal Roy Chowdhury* (4), that where there was a definite contract to render an account yearly, Article 115, and not Article 89, would be the Article

(1) (1890) 12 All. 541.
(2) (1899) 26 Cal. 715.
(3) (1887) 14 Cal. 147 ; 13 I. A. 123 ; (P. C.)
(4) (1910) 5 I. C. 59.

applicable in the case of unregistered contracts. This case proceeded to some extent on the authority of a decision in *Mati Lal Bose* v. *Amin Chand Chattopadhy* (5), that in the case of a contract in writing registered, Article 89 does not apply, but Article 116. The authority of the latter decision has been doubted in *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (6) and *Hafezudin Mandal* v. *Jadu Nath Saha* (7), and it is not in my view conclusive of the present case.

As regards the present question, it seems to me that the agent's contract to account to his principal, whether express or implied, is specially provided for in Article 89, and if that be so, it cannot, having regard to the language of Article 115, be brought under that Article. I am, therefore, unable with great respect to follow the decision in *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhury* 4), and hold that the suit was barred and that the appeal must be allowed, and the suit dismissed with costs throughout.

The memorandum of objection is not pressed and is dismissed.

Seshagiri Aiyar, J.—I agree with the learned Chief Justice. The suit is by the plaintiffs, the principals, for an account against the 1st defendant, the agent. The Subordinate Judge disbelieved the plea that the accounts were finally rendered and passed a preliminary decree for the taking of accounts. Mr. C S. Venkatachariar for the 1st defendant in the appeal argues that the suit is barred by limitation.

With great reluctance I have come to the conclusion that the contention is well-founded. I do not see my way to holding that either Article 115 or Article 120 of the Limitation Act applies to this case, as contended for by Mr. C. V. Ananthakrishna Iyer for the respondents Nos. 1 to 5. Article 115 is the residuary Article relating to contracts and is made applicable only where there is no special provision relating to contracts. Article 120 is the general residuary Article. Article 89 in terms provides for an account respecting moveable property received by the agent from the principal. The Judicial Committee have laid down in *Asghar Ali Khan* v. *Khurshed Ali Khan* (8) that money is moveable property within the meaning of this Article. The suggestion of the learned Vakil for the respondents Nos. 1 to 5, that as the account claimed by the principal related to moneys lent out by the agent on his behalf, and which are still unrealised, the present claim is not for moveable property received from the principal, ignores the fact that the outstandings are part of the original advance made by the plaintiff to the defendant and of its augmentation. It was also contended that as Exhibit A provided for the rendering of the account at Devakotta on the return of the agent from Burma, the agency did not terminate till that was done. I am unable to accept this contention. Under S. 201 of the Contract Act an agency is terminated by the principal revoking his authority or by the business of the agency being completed. In this case, the plaintiffs sent a telegram on the 24th November 1906 to the 1st defendant to handover to one Muthiah the accounts (Exhibit VII) on the 18th December 1906 ; he asked the agent to start immediately (Exhibit VI-B). A similar communication was sent on the 20th December 1906 (Exhibit VII-A). On the 2nd March 1907, the 1st defendant handed over the accounts to Muthiah and started for Madras. I am of opinion that the agency terminated on this date and as the suit was instituted more than three years after this date, it is barred by limitation.

The decisions in *Babu Ram* v. *Ram Dayal* (1) and *Fink* v. *Buldeo Das* (2) do not affect this conclusion. It was held in those cases that until an agent for the sale or purchase of goods pays the sale-proceeds or delivers the purchased properties to the principal, the agency does not terminate. This rests on the ground that the business is not completed with the effecting of the sale or purchase, because it is the essence of an agency in such cases that the sale-proceeds or the property purchased should be handed over to the principal.

It is said that the first defendant took Rs. 200 as passage money for which he had to render an account. There may be a separate accountability for this sum, but this is no part of the business carried on in Rangoon for which the defendant was

(5) (1905) 1 C. L. J. 211.
(6) (1905) 32 Cal. 719.
(7) (1908) 35 Cal. 298.

(8) (1902) 24 All. 27 ; 28 I. A. 227 (P.C.).

constituted the agent. It is in evidence that the agent came to Madras and handed over some accounts to the plaintiff at Devakotta. That fact will not have the effect of intercepting the termination of the agency. The business on which the 1st defendant was engaged was completed when he handed over the accounts to Muthiah. That was in obedience to the order of the plaintiffs in that behalf, thereby revoking the agency. The 1st to 5th respondents' Vakil relied on *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhury* (4) for the position that when there is a special contract fixing a date for the rendering of the accounts, the Article applicable to suits by principals against agents is Article 115 and not Article 89. The fixing of a date for rendering accounts cannot stop the termination of the agency. The authority relied upon in *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Chowdhury* (4) has been dissented from by Maclean, C. J., in *Hafezuddin Mandal* v. *Jadu Nath Saha* (7). Mr. Justice Mukerjee in *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (6) held that Article 89 would apply to a case like the present. I am, therefore, constrained to hold that the suit is barred by limitation.

S. N./R. K.

Appeal allowed ; *Suit dismissed.*

A. I. R. 1916 Madras 284

WHITE, C. J. AND OLDFIELD, J.

Lakshmammal—Appellant.

v.

Narasimharaghava Iyengar and *others*—Respondents.

Original Side Appeal No. 52 of 1912, and Civil Suit No. 184 of 1910 decided on 27th August 1913, from the Judgment of Wallis, C. J., dated 29th July 1912.

Negotiable Instruments Act (26 of 1881), S. 87—Alterations, in legal effect, terms or relations of parties, are material changes—Alteration giving right to sue where there was none is material Suit in Madras on note executed in Mysore torn in places affecting its validity in the place of origin is held not tenable.

A change in an instrument which causes it to speak in a language different in legal effect from that which it originally spoke and which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change or, technically, an alteration ; and such change will invalidate the instrument against all parties not consenting to the change. The question in such a case is whether the integrity and identity of the contract has been changed. An alteration which gives a man a right of action which he would otherwise not have is a material alteration.

[P. 285, C. 2 & P. 286, C. 1 & 2.]

Where a promissory-note was executed in Mysore by the defendants in favour of the plaintiff and a suit was instituted on the note in Madras as the defendants were resident at the time of suit in Madras and the promissory-note was found torn in a material portion affecting its validity in the place of its birth, it was held that this amounted to a material alteration which did not allow the plaintiff to sue the defendants on the note, although the question of the alteration, in so far as a suit based on the original note was concerned, was immaterial for a suit being brought in Madras [P. 284, C. 2 & P. 285, C. 2.]

S. Srinivasa Aiyangar—for Appellant.

R. Sadagopachariar—for Respondents.

White, C. J.—This is an appeal from a decree given by Mr. Justice Wallis dismissing the plaintiff's suit on the ground that the two documents on which he relied had been materially altered and that for that reason the defendants were not liable thereon. The suit was brought on two instruments executed in Mysore by the father of the defendants, the father being a resident in Mysore in favour of the plaintiff who with her husband was also an inhabitant of Mysore. When the documents were put in in evidence, it was found that they had been torn and mutilated. The learned Judge declined to believe the story put forward by the plaintiff to account for the mutilation of the documents. I agree with the learned Judge that this story could not be accepted. The effect of the mutilation was to cause the words " or order " to disappear from the two documents. There is very little direct evidence on this point, but the learned Judge holds in effect that the missing words were " or order " or words to that effect and I take the same view. This was not in fact seriously contested by the plaintiff and Mr. S. Srinivasa Iyengar's argument proceeded on the assumption that the words " or order" were contained in the two documents as they were originally executed. Mr. Justice Wallis held that the alterations were made with the obvious purpose of enabling these documents, which could not be sued upon, to be sued upon when it was accepted that they would have to be sued upon, namely,

in Mysore. There was some discussion as to whether the documents in their original form were bonds or promissory-notes. In the plaint, they are described as bonds ; but in the documents themselves they are described as promissory-notes. As promissory-notes they are insufficiently stamped ; and, whether or not in this state of things they could be sued on in their original form in Madras, it seems clear that the insufficiency of stamp would have been a fatal obstacle to their being sued on in Mysore.

I should be prepared to take the same view as the learned Judge and to hold that the alterations were made in order that these documents could be sued upon in Mysore. If this is so, it seems to me to be absolutely clear that the alterations were material alterations, since they were made for the purpose of enabling the plaintiff to sue in a Court in which, if the alterations had not been made, she would not have been able to sue. They appear to me to be nonetheless material alterations because the defendants at the time the suit was instituted, being, as events turned out residents in Madras for educational purposes, the plaintiff was able to institute her suit in this Court. In the view that alterations were made with the object of enabling the plaintiff to institute her suit in this Court, I am of opinion that the alterations are material and that the defendants are not liable on the document.

In connection with this part of the case Mr. Srinivasa Iyengar relied on a decision of this Court in *Mahomed Rawthan* v. *Mahomed Hussain Rawthan* (1), in which it was held that there was no provision of law which required a promissory-note executed out of British India to be stamped before it was sued on or used in a Court where the holder of the note had not done any of the acts referred to in Ss. 5 and 18 of the Stamp Act, and in consequence the *obligation to* stamp had not arisen. Mr. Srinivasa Iyengar's argument was that inasmuch as the defendants could be sued on the original documents in this Court without being met by the stamp objection, the alteration made in the documents for the purpose of enabling the plaintiff to sue in this Court was unnecessary and was made under a misapprehension, and that, therefore, the alteration of the documents was immaterial since a suit could have been brought in this Court either under the documents as they originally stood or in their altered form.

It seems to me that alterations made in these circumstances clearly come within the "mischief" of the rule of law with reference to the alteration of instruments.

The cases are discussed in the notes to the case, *Master* v. *Miller* (2). I do not propose to refer to those cases because I find what appears to me to be an accurate exposition of the law in the case, *Gour Chandra Das* v. *Prasanna Kumar Chandra* (3) : "Any change in an instrument, which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, an alteration, and such a change will invalidate the instrument against all parties not consenting to the change. This is a wholesome rule founded on sound policy and may be defended on two grounds, namely, *first*, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected, and, *secondly*, that by the alteration, the identity of the instrument is destroyed, and to hold one of the parties liable under such circumstances would be to make for him a contract, to which he never agreed. [See *Lee* v. *Butler*, (4)]. The question to what extent the identity of an instrument must be changed in order that its legal effect will be altered so as to bring the case within the terms of material alteration vitiating the instrument, must depend upon the nature of the alteration in each particular case. The test is not necessarily, however, whether the pecuniary liability of one of the parties has been increased by the change ; it is of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether

(1) (1899) 22 Mad. 337.

(2) 1 Smith's L. C. 767 = 2 H. Bl. 140.
(3) (1906) 33 Cal. 812.
(4) (1897) 167 Mss. 426=57 Am. St. Rep. 466.

the integrity and identity of the contract have been changed. It is to prevent and punish such tampering as changes the identity of the contract, that the law does not permit the plaintiff to fall back upon the contract as it was originally, or in the language of Swayne, J , " in pursuance of a stern but wise policy, the law annuls instruments as to the party sought to be wronged."

The decision, upon which Mr. Srinivasa Iyengar relied as an authority for his proposition that on findings of fact, to which I have referred, the alteration of the document in this case was immaterial was the judgment of the Court of Appeal in the case of *Decroix Verley et Cie* v *Meyer & Co.* (5). That case, it seems to me, has really no bearing on the question we are now considering. In that case, a Bill of Exchange being drawn by one L.D. Flipo payable "to order L.D. Flipo" the drawees struck through the word " order " and accepted the bill " in favour of L.D. Flipo only, payable at the Alliance Bank, London." In an action upon the bill by indorsees for value against the acceptors, it was held that the acceptance did not vary the effect of the bill as drawn, and that it was, therefore, a general acceptance of a negotiable bill, and the action was maintainable. The ground of decision in that case was that although the drawees intended to restrict the negotiability of the bill and struck out the word " order " for that purpose, their acceptance was in law a general acceptance and the suit by the indorsees as against them as acceptors was maintainable Notwithstanding what the acceptors did in that case, the bill continued to be a negotiable instrument by virtue of S. 8, sub-S. 4, of the Bills of Exchange Act, 1882, as Bowen, L. J., put it in his judgment on page 350 :—

" The bill itself was originally drawn payable to order The word ' order ' was, it is true, struck through ; but the effect of the 4th sub-section of the 8th section of the Bills of Exchange Act is to put it in again." In Bill of Exchange cases, where the question of material alteration has arisen, there is no case, so far as I know, in which it has been suggested that an alteration which gave a man a right of action which he would not otherwise have, is not a material alteration.

Mr. Srinivasa Iyengar did not argue that, if the plaintiff could not have sued in this Court on the original document, the alteration was not material. I am of opinion that, assuming he could have sued in this Court on the original documents, the alterations made in the circumstances in which in this case they were made, were material alterations. This being my view, I do not think it necessary to discuss the question whether the plaintiff could have sued in this Court on the documents as they stood in the form in which they were drawn in the first instance. I do not see how Mr. Srinivasa Iyengar could well rely on any case with reference to what is a material alteration within the meaning of S. 87 of the Indian Negotiable Instruments Act, since on the findings of fact in this case the object of the alteration was to convert the two documents which were originally negotiable instruments into non-negotiable instruments. But even if it is open to him to rely on any decision in connection with this branch of the Law of Bills of Exchange, he certainly has not called our attention to any case, as it seems to me, which supports his proposition. I am of opinion that the alterations made in these two documents in the circumstances in which they were made would be material alterations for the purposes of S. 87 of the Negotiable Instruments Act, if we had to consider the question in connection with that enactment and that they are material alterations within the general rule of law to which I have referred. I am, therefore, of opinion that Mr. Justice Wallis was right and I would dismiss the appeal with costs.

Oldfield, J.—I concur.

S. N./R. K.

Appeal dismissed.

(5) (1890) 25 Q. B. D. 343=59 L. J. Q. B. 538.

A. I. R. 1916 Madras 287

SANKARAN NAIR AND TYABJI, JJ.

Abdul Razak Sahib and *others*—Plaintiffs—Appellants.

v.

Secretary of State and *others*—Defendants—Respondents.

Second Appeal No. 855 of 1913, decided on 22nd December, 1914, from the decree of Sub-Judge, South Canara, in Appl. Suits Nos. 465 and 477 of 1910.

(a) Grant—*Darkhast* Rules—Grounds for setting aside grants are fraud, mistake of fact, or want of jurisdiction—Assignment of '*warg*' made through mistake cannot be cancelled.

A grant of land once made under *darkhast* rules by an officer competent to make it can be set aside by superior officers only for fraud, mistake of fact or want of jurisdiction. An assignment of a *warg* once made under the impression that it included also submerged lands, cannot subsequently be cancelled on the ground that it did not. [P. 288, C. 1.]

(b) Alluvion Diluvion—Submerged land remains property of former owner unless struck out from *Patta* and assessment reduced.

Land submerged under water is still the property of the former owner, unless struck out from his *patta* and the assessment proportionately reduced. [P. 288, C. 1.]

B. Sitarama Rao—for Appellants.

S. Swaminadhan—for Government.

Tyabji, J.—The Subordinate Judge has dismissed the plaintiffs' suit on a construction of Exhibit C which cannot be accepted. Under it the plaintiffs became entitled to be considered the owners of "re-formed" lands at their option.

The Subordinate Judge's reasoning that the lands in question did not form part of *warg* No. 32 is based on the ground that the plaintiffs' predecessor-in-title got on *darkhast* a specific extent of land for a specified amount of assessment. But the *warg* number was continued and the unit purported to be granted on *darkhast* was same as the original *warg* No. 32. The extent of land correctly represented the extent of the *warg* number for the time being. There is nothing to show that any portion of the land forming part of the original *warg* number 32 was "struck out of the *patta*." The indication is rather the other way.

It is next contented on behalf of the 1st defendant that the *patta* and the order (Exhibits E and F) on which the plaintiffs' rely were cancelled. Though there is such an allegation in the written statement no issue was framed on the point, the order (if there was any) by which Exhibits E and F were cancelled is not in evidence; still less is there any material, on which it can be held that there was either any mistake of fact or fraud or that public interests were so affected by Exhibits E and F as to permit of their being validly cancelled. It was suggested that an opportunity should now be given to the 1st defendant to prove all these matters. It is too late, however, to permit of this being done now: the written statement does not contain any particulars of fraud or mistake or any allegation that Exhibits E and F prejudicially affected public interests and were, therefore, validly cancelled.

The appeal must, therefore, be allowed and the decree of the District Munsif restored with costs throughout. Under S. 82 of the Civil Procedure Code six weeks are specified for the time within which the decree shall be satisfied.

It follows that the memorandum of objections should be dismissed with costs.

Sankaran Nair, J.—I agree. *Warg* No. 32 had *taram* assessment of Rs. 64. In *Fasli* 1270 an order was passed to collect an assessment of Rs. 38-12-2. A widow, Sridevi, who was then the *wargdar* presented a petition (Exhibit X) that the land has been yielding her, only 8 annas a year and that she paid this heavy assessment for 10 years at great loss to herself. She had to relinquish the *warg*. The relinquishment was accepted in 1870 (Exhibit IX). Thereupon Subraya Naik applied for it, claiming it as his "ancient land" (Exhibit XXXVI). It was given to him with a reduced assessment (Exhibit XXXVII). One of the questions for decision is whether the entire *warg* No. 32, including part of it which was under water, was given to him or only the land as it then remained available for cultivation. In the revenue accounts the land, *warg*, was given the old number entered under the name of the old *wargdar* even after these reductions in the assessment (Exhibits O and XII). The *taram* assessment, Rs. 64, was entered though the amount entered as leviable for collection was the reduced

amount. It was still classed *khambarti*. For these reasons the probability is that the entire *warg* No. 32 was granted to Subraya. This is placed beyond doubt by what subsequently took place. In 1893 an order was issued that in cases of lands submerged and re-formed the rights of former owners cannot be considered as extinguished unless the *pattadars* relinquished and got such land struck out of their *pattas* (Exhibit C) and if not so done, the *pattadar* was to continue liable for full assessment even for land under water. In accordance with this the *pattadar* elected to receive the *patta* for the entire land and a *patta* was granted in the name of the old *wargdar* for the entire land bearing the full assessment (Exhibit E) by the Head Assistant Collector. It is said that this *patta* has been set aside by the superior authorities. That order is not before us. It is not denied that the Head Assistant Collector was competent to issue the *patta*. No mistake or fraud is alleged or proved. As I have already pointed out, the Head Assistant Collector was right in granting the *patta*; the land submerged not having been struck out of the *patta*. But assuming that he committed an error of judgment, in the absence or any invalidating circumstance like want of jurisdiction, mistake or fraud, etc., the *patta* is valid and not liable to be set aside by any superior authority.

It is also assumed by the lower Appellate Court that when Sridevi, a Hindu widow, relinquished the *warg*, it was at the absolute disposal of Government. In the absence of any statutory provision to the contrary, a relinquishment by her can only affect her interest.

I concur in the proposed decree.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 288

SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Mahammad Husain Saib and *another*—Defendants—Appellants.

v.

Abdul Kareem Saib—Plaintiff—Respondent.

Appeal No. 75 of 1914, decided on 19th March 1915, against the order of Dist. Judge, Salem, in Appl. Suit No. 118 of 1912.

(a) Transfer of Property Act (4 of 1882), Ss. 88 and 89—Preliminary decree under S. 88 is executable—Application for final decree is execution proceedings—Arts. 182 or 183 of Limitation Act applies.

A preliminary decree in a mortgage suit passed under section 88 of the Transfer of Property Act is executable and in order to obtain an order absolute under S. 89 steps have to be taken in execution; and Article 182 or 183 of the Limitation Act will apply to such applications if the decree happens to be passed by a Mofussil Court or by the original side of the High Court. [P. 289, C. 2 & P. 290, C. 1.]

(b) Civil P. C. (5 of 1908), S. 48—In mortgage decree decree-holder can have 12 years for getting a final decree if proper steps are taken and another 12 years to execute the decree by taking steps-in-aid—(Case-law discussed.)

A decree-holder will have 12 years under S. 48 of the Civil Procedure Code to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years. [P. 290, C. 1.]

Where a preliminary decree in a mortgage suit was passed on the 7th October 1901 and the first application to obtain an order absolute was made on 6th April 1904 and subsequent applications were made in 1907, 1910 and 1912 all within the three years of the immediately preceding application and all the applications were dismissed without granting the relief prayed for, and the present application was made on the 15th April 1912:

Held, that the application was not barred by limitation. 25 Mad. 244; 26 Mad. 780; 33 All. 264, (P C.) A. I. R. 1914 Mad. 365; A. I. R. 1914 P. C. 66; 27 I. C. 683, ref. to.

[P. 288, C. 2 & P. 290, C. 1.]

S. Doraisami Iyer—for Appellants.

M. O. Parthasarathy Iyengar and *M. C. Krishnamachariar*—for Respondent.

Judgment.—This appeal raises an important question of limitation. A preliminary decree in a mortgage suit was passed on the 7th October 1901. On the 6th April 1904, the first application was presented to obtain the order absolute. This apparently was filed as an application for the execution of the preliminary decree. Subsequent applications were made in 1907, 1910 and 1912, all within three years of the immediately preceding application. Notices were sent in most of the applications. They were all dismissed without granting the relief prayed for. The present application is dated the 15th April 1912. It was objected to in the Court of first instance

that as more than three years had elapsed from the date of the preliminary decree, the application was barred. The District Munsif held that there was no bar of limitation for such applications. On appeal, the District Judge held that the present application must be treated as one in execution of the decree and that Article 181 of the Limitation Act applied to it.

Mr. S. Doraiswami Iyer has cited before us a large number of authorities to show that the preliminary decree is not executable and that Article 180 applies to the application. There have been conflicting decisions regarding the executability of the preliminary decree. Different High Courts have taken different views. We wish to confine ourselves to a consideration of the decisions of this Court and of the Judicial Committee of the Privy Council.

In *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), the majority of the Full Bench came to the conclusion that the preliminary decree in a mortgage suit was executable, and that the process for obtaining the order absolute was by way of execution. In arriving at this result the learned Judges were largely influenced by the language of Ss. 88 and 89 of the Transfer of Property Act. The first section speaks of the *preliminary decree* and the second section of applying for an *order* absolute. Even after the pronoucement in the Full Bench case, doubts arose regarding the applicability of Article 179 of the Limitation Act—(Act XV of 1877). As was pointed out by Mr. M. O. Parthasarathy Iyengar, the learned Counsel for the respondent, the import of the Full Bench ruling was explained in *Rangiah Goundan & Co.* v. *Nanjappa Row* (2). It was suggested in that case that ordinarily an application for an order absolute will be one to which Article 179 would apply. In certain cases Article 178 may also apply. This view was acted on in this Presidency for a long time until the decision of the Judicial Committee was reported in *Haji Ashfaq Husain* v. *Lal Gauri Sahai* (3). That decision, as we shall show presently, does not affect the conclusion stated in *Rangiah Goundan & Co.* v. *Nanjappa Row* (2). All that was laid down in *Haji Ashfaq Husain* v. *Gauri Sahai* (3), was that time began to run against the decree-holder after the passing of the final decree, that is, "from the date when it was made absolute." It did not say that the preliminary decree was not executable. But it was so understood in some of the cases decided in Madras. It is not necessary to refer to all the decisions. They are all mentioned in *Epoor Ramasamy Reddy* v. *Kandadai Rangamannar Iyengar* (4). In that case Sankaran Nair and Ayling, JJ., without expressing their opinion regarding the correctness of the decisions they quoted, held that the judgment-debtor was barred by *res judicata* from raising the plea that the preliminary decree was not executable. All these decisions were passed before the Judicial Committee's decision in *Abdul Majid* v. *Jawahir Lal* (5) was published. That case lays down distinctly that the Article applicable to an application for obtaining an order absolute is 179 of the Limitation Act.

This pronouncement must be taken to overrule the decisions of this High Court which held that the preliminary decree was not executable. Another decision of the Judicial Committee strengthens this view. In *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6), their Lordships held that an application for an order absolute regarding a preliminary decree passed on the original side of the High Court was governed by Article 183 of the Limitation Act. Although the third column of that Article speaks of the "enforcement" of a judgment, decree or order, there can be no doubt that it is a provision for the execution of decrees passed on the original side, corresponding to Article 182 which deals with the Mofussil decrees. This view makes it clear that the process by which a preliminary decree is to be made the final decree is by way of execution.

The result of these decisions of the Judicial Committee may be thus summed up: (1) The preliminary decree passed under S. 88 of the Transfer of Property Act is executable. (2) In order to obtain the order absolute under S. 89, steps

(1) (1902) 25 Mad. 244.
(2) (1903) 26 Mad. 780.
(3) (1911) 33 All. 264; 9 I. C. 975.
(4) A. I. R. 1914 Mad. 365; 23 I. C. 390.
(5) 36 All. 350=A.I.R. 1914 P. C. 66=23 I. C. 649.
(6) (1915) 27 I. C. 683.

have to be taken in execution. (3) To such applications Article 182 or 183 will apply, as the decree happens to be for the Moffusil or for the original side of the High Court. (4) There is a fresh starting point given to the decree-holder after the preliminary decree ripens into a final decree. (5) It would follow from the above that a decree-holder will have 12 years under S. 48 of the Code of Civil Procedure to perfect the preliminary decree and another 12 years under the same section if he gets the order absolute within the first 12 years. This view is in consonance with the earlier Madras view in *Mallikarjunadu Seth* v. *Lingamurti Pantulu* (1) and in *Rangiah Goundan & Co.* v. *Nanjappa Row* (2).

All these difficulties are now avoided by the enactment of O. 34 in the Code of Civil Procedure.

For these reasons we hold that as the application for an order absolute was made within 12 years of the passing of the preliminary decree and as the decree has been kept alive by the steps taken under Article 179, this application is not barred by limitation.

We dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 290 (1)

SPENCER AND SESHAGIRI AIYAR, JJ.

In re *Madiga Pothugadu*—Prisoner—Appellant.

Criminal Appeal No. 603 of 1914, decided on 12th January 1915, against the Order of S. Judge, Cuddapah, in Case No. 45 of 1914.

Criminal P. C. (5 of 1898), S. 339—Sessions Judge and not Committing Magistrate must record finding of forfeiture of pardon.

Where an accomplice forfeits the pardon offered to him, it is the duty of the Sessions Judge to record a finding as to the forfeiture. It is not enough that the Committing Magistrate does so. [P. 290, C. 1 & 2.]

P. R. Grant—for the Government.

Judgment.—The Sessions Judge has not asked the prisoner whether he relies on the pardon granted to him and has not tried the issue whether the pardon has been forfeited. *Kullan* v. *Emperor* (1).

It is not enough that the Committing Magistrate has found that the pardon has been forfeited, for, as pointed out in *King-Emperor* v. *Bala* (2), the Sessions Judge might have held a different opinion from the Magistrate on such a question of fact. We, therefore, set aside the conviction and sentence and direct the accused to be re-tried in the Sessions Court of Bellary.

S. N./R. K.

Re-trial ordered.

(1) (1909) 32 Mad. 173; 2 I. C. 343.

(2) (1901) 25 Bom. 675.

A. I. R. 1916 Madras 290 (2)

SPENCER AND SESHAGIRI AIYAR, JJ.

Parvathi Ammal—Defendant—Appellant.

v.

Govindasami Pillai—Plaintiff—Respondent.

Second Appeals Nos. 1127 and 1147 of 1914, decided on 26th August 1915, against the decrees of Tempy., Sub-Judge, Tanjore, in Appeal Suits Nos. 690 and 718 of 1912.

Civil P. C. (5 of 1908), O. 21, R. 93—Stranger purchaser can sue for poundage fee paid and interest on deposit on sale being set aside for irregularities by decree-holder—Nature of poundage fee pointed out.

A third party purchaser at an execution sale, which was subsequently set aside owing to the irregularities in the conduct thereof for which the decree-holder was responsible, is entitled to sue and recover from the decree-holder the amount of poundage which was deducted from the purchase money deposited by him into Court as well as interest on such deposit. There is nothing in O. 21, R. 93, which debars such a suit. [P. 290, C. 2; P. 292, C. 2; P. 293, C. 1 & P. 292, C. 2.]

The nature of poundage fees pointed out.

K. S. Ganapathi Iyer—for Appellant.

G. S. Ramachandra Iyer—for Respondent.

Facts.—The facts of the case appear clearly from the judgment.

Judgment.—The facts of the case are not in dispute. The defendant obtained a decree against certain persons. Immoveable properties were sold under that decree, and the plaintiff became the purchaser. At the instance of the judgment-debtors the sale was set aside on the ground of irregularities in the conduct of the sale. Plaintiff, the purchaser, sued to recover the amount of the poundage fee deducted from the purchase-money

paid by him, and also interest. The claim for Vakils' fees, etc., has not been pressed before us. The District Munsif held that plaintiff was entitled to interest at 6 per cent. and that a separate suit does not lie to recover poundage. Both the parties appealed. The Subordinate Judge held that the claim for poundage was sustainable, but that interest should not have been decreed. Second Appeal No. 1127 of 1914 is by the defendant against the decree for poundage. Second Appeal No. 1147 of 1914 is by the plaintiff for the interest disallowed.

Before dealing with the question of law argued before us, we may state that we see no reason to differ from the conclusion of the Courts below that defendant is responsible for the irregularities in the conduct of the execution sale. In the order passed on the application of the judgment-debtor, the Subordinate Judge held "that the decree-holder was responsible for the material irregularity in publishing or conducting the sale." (See paragraph 9 of the District Munsif's judgment). The District Munsif in the present suit came to the same conclusion —apparently the liability of the defendant was not disputed in appeal. It is true the Court in ordering the sale of the property should have directed the *amin* to sell the property in different lots, but that would not absolve the defendant from his liability. The responsibility of the officer leaving execution in the *moffussil* is not that of the Sheriff in England. It is the duty of the decree-holder to put the Court in possession of the necessary information and to attend to the various requirements of the law in publishing and conducting the sale. The Court cannot be proceeded against for irregularity in execution, if it acted to the best of its information and without malice. The party who puts the Court in motion is liable to the purchaser who has been aggrieved. Even in Sheriff's sales, the purchaser is entitled to proceed against the decree-holder. In *Dorab Ally Khan* v. *Executor of Khajah Moheeoodeen* (1), in which the Judicial Committee had to pronounce upon the liability of the Sheriff who executed a decree of the original side of the Calcutta High Court, it was pointed out that the Sheriff may render himself liable if he seized the property situated beyond his territorial jurisdiction, or if he exceeded the powers expressly conferred on him by the Statute. Their Lordships have also laid down that where the Sheriff acts under the advice and guidance of the execution creditor, the latter will be responsible to the purchaser. The present is an *fortiori* case.

The main question argued related to the maintainability of the suit. Mr. Ganapathi Aiyar contended that the plaintiff should have sought redress in execution and that a separate suit does not lie. S. 315 of Act XIV of 1882 provided for two classes of cases: (1) where the sale has been set aside as provided for in the Code and (2) where it was found that the judgment-debtor had no saleable interest in the property sold. The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase-money without applying to set asid the sale, when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be, as suggested by Mr. Ramachandra Aiyar for the respondent, that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ally Khan* v. *Executor of Khajah Moheeoodeen* (1) that there was no warranty of title in Court sales. See also *Sundara Gopalan* v. *Venkatavarada Ayyangar* (2). The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser but is only the creature of a Statute and the right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through Court, the purchaser has no right of action. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given him by the Statute. But the right to recover from a party whose fraud or carelessness has led to the invalidity of the sale stands on a different footing. In such cases by neglecting the duty cast on him, he renders himself liable to compensate the injured party for the loss the latter has sustained. The right is not created for the first time

(1) (1877-78) 3 Cal. 806=5 I. A. 116.

(2) (1894) 17 Mad. 228.

by the Statute. The Code only recognised what has existed all along. As stated by Sir James Bacon (Vice-Chancellor) in *Powell* v. *Powell* (3), the purchaser is entitled under these circumstances to be discharged from his contract by reason of the invalidity of the proceedings which led up to the sale and is entitled to be placed in *status quo ante*. The same proposition is stated in 24 Cyclopædia of Law and Procedure 70, thus:—

"It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase-money paid by him, and to be reimbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land."

The decision in *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (4), on which the appellant relied strongly, does not touch the present question. Mr. Justice Napier held in that case that where the purchaser was deprived of the possession by reason of a decision in a subsequent suit, he is not entitled to sue for the return of the purchase-money. The omission from the Code of 1908 of the clause relating to the want of "saleable interest" in the judgment-debtor is relied on strongly by the learned Judge. In the present case the sale has not become abortive owing to the absence of saleable interest in the judgment-debtor. Mr. Ganapathy Aiyar contended that the words of S. 315 of Act XIV of 1882 "that the purchaser shall be entitled to receive back his purchase-money" may confer a right of suit as held in numerous cases, but that the words "shall be entitled to an order for re-payment" in R. 93 indicates a deliberate policy to restrict the remedy to execution in all cases of sales being set aside. We are unable to see the distinction. There are no words in the present Code, as in the Code of 1882, enabling the purchaser to realise his money by way of execution. Further, he is no party to the suit or the decree. Unless, therefore, his right of action is taken away by express words, he is entitled to pursue his ordinary remedy by filing a suit.

Another contention of the appellant was that as poundage is taken by the Court, the decree-holder is not bound to pay it to the purchaser. This argument proceeds on a misconception of the nature of the poundage fees. As was pointed out by Mr. Ramachandra Aiyar in his able argument, what the purchaser claims is really a portion of the purchase-money. It is from the payment made by him the Court makes a deduction for poundage and pays the balance to the decree-holder. Poundage is the fee which is levied in England by the Sheriff as remuneration for his services. In this country, as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase-money is taken for purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from the Court. In England as well as in this country, this fee is taken out of the sale-proceeds. See paragraph 71 in 14 Halsbury's Laws of England and R. 154 of the Civil Rules of Practice. There is, therefore, no warrant for the suggestion that in claiming the money retained as poundage fee, the purchaser does not ask for the return of the purchase-money. Nor do we see any reason to assent to the argument that the claim for the recovery of such fees should be disposed of in execution. The omission of the word "poundage" in R. 157, clause (2), was much relied on. This omission cannot affect the substantive right of suit which the purchaser has. It was held in *Rawstorne* v. *Wilkinson* (5), that the Sheriff has a right of action to recover poundage fees where the sale proves abortive. See also *Tyson* v. *Paske* (6). The auction-purchaser whose money has been paid by way of poundage to the Sheriff will stand in his shoes to recover it against the execution creditor. The fact that it is retained by the Court can make no difference in principle. We have, therefore, come to the conclusion that the Subordinate Judge was right in holding that the suit is not obnoxious to the execlution provisions of the Code of Civil Procedure. We dismiss Second Appeal No. 1127 of 1914 with costs.

We are, however, unable to agree with the lower Appellate Court that the purchaser has lost his right to interest by any laches on his part. He is under no duty to see that the property is put up

(3) 19 Eq. Cas 422=44 L. J. Ch. 311.
(4) (1912) 17 I. C. 437.
(5) 4 M & S. 256=16 R. R. 455.
(6) 2 Raym 1212=19 E. R. 300.

for sale in separate lots. He is not affected by any anterior mismanagement in the conduct of the sale. He has to take the property as advertised and sold. As he paid the money required by law, there is no reason for depriving him of the interest on his money. See *Raghubar Dayal* v. *Bank of Upper India Limited* (7). The rate of interest awarded by the Munsif is correct. We must reverse the decree in Second Appeal No. 1147 of 1914 with costs in this and in the lower Appellate Court and give a decree for Rs. 306 with interest at 6 per cent. from the date that the plaintiff deposited the money into Court.

Second Appeal No. 1127 *of* 1914 *dismissed*;

Second Appeal No. 1147 *of* 1914 *allowed.*

(7) (1883) 5 All. 364.

A. I. R. 1916 Madras 293

Full Bench.

WHITE, C. J., AYLING AND OLDFIELD, JJ.

R. P. Koneti Naicker and *others*—Appellants.

v.

Jatu Gopala Aiyar and *another*—Respondents.

Letters Patent Appeal No. 167 of 1912, decided on 19th August 1913, from the Judgment of Sundara Aiyar and Sadasiva Aiyar, JJ., dated 13th August 1902, in Second Appeal No. 105 of 1910.

Negotiable Instruments Act (26 of 1881) S. 28—Promissory-note signed not as agent and without reference to principal—Agent was held personally liable.

Where the maker of a promissory-note described himself in the body of the note as an agent, but his promise to pay was unqualified by any reference to his alleged principal and the note was also signed without any addition to the signature :

Held, that there was no indication in the note that the maker signed as agent or that he did not intend to incur personal liability.

[P. 295, C. 2.]

S. Varada Chari for *Gopalaswami Iyengar*—for Appellants.

B. Sitarama Rao—for Respondents.

White, C. J.—The main question we have to determine is whether the party who signed the promissory-note in question as maker is personally liable thereon. The following is a translation of the note :—

"12th August 1907, corresponding to 28th Audi Plevanga—Promissory-note executed to you both (1) Gopalaiyar and (2) Nagasamier, sons of Soothi Seshaiyar, residing in No. 1, Police Station Lane, Madura Town, by R. P. Koneti Nayudu Garu, son of Nanjundappa Nayudu Garu, agent holding power-of-attorney from the *zemindar*, Dorai Rajah Avergal and residing in Vellikurichi Village, Mana Madura *Taluk*, Madura District.

"Amount due to you including principal and interest up to date upon settlement of account of dealings which was standing against the name of Ranichekkaniammal on cloths etc., having been purchased ere this for the Vellikurichi palace, is Rs. 694-6-0. On demand, I promise to pay this sum of rupees six hundred and ninety-four and annas six with interest at Rs. 5-8-0 per cent. per mensem from this date either to you or order and shall take this back with the endorsement of payment thereon.

(Signed) R. P. KONETTI NAYUDU"

(*in Telugu.*)

The contention for the appellant was that the *zemindar* was liable on the note and not the party who signed it.

S. 28 of the Indian Act (Negotiable Instruments Act, 1881) makes the party who signs liable unless, there is, on the note, an indication that he signs as agent, or that he does not intend to incur personal responsibility.

The words in the instrument before us, which are relied on as affording the required indication: are the words in the body of the note "agent holding power-of-attorney from the *zemindar*." If I had to decide the question entirely on the words of the instrument, leaving out of consideration the English decisions, I should be prepared to hold, as a matter of construction, that there is no indication on the note that the maker signed as agent or that he did not intend to incur personal responsibility. He is described as holding a power-of-attorney from the *zemindar*. It is not stated that the power-of-attorney included a power to sign promissory-notes, or that the note was signed in pursuance of the power.

There are no words added to the signature indicating that the maker signed in the capacity of agent.

It was suggested that the law as laid down in the English cases before the English and the Indian Acts was not the same as the law under the Acts and that the English cases which supported the respondent's contention that the maker was personally liable could not be relied on. I do not agree.

The Indian Negotiable Instruments Act was passed in 1881, one year before the English Bills of Exchange Act, 1882. The latter enactment was drafted by Sir M. D. Chalmers and was based on his Digest of the Law of Bills of Exchange published by him in 1878. In the preface to the 3rd Edition of his book on the Act, he states that for the most part the propositions of the Act were taken word for word from the propositions of the Digest. He goes on to observe that since the Act the cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. This statement is consistent with the observations on the same subject, made by Lord Herschell in *Vagliano* v. *The Bank of England* (1), and seems to me to be equally applicable to the Indian Act.

Sir M. D. Chalmers states in his introduction to his first Edition of the Indian Act that it re-produces in a statutory form the English Common Law of negotiable instruments with scarcely any modifications. Elsewhere he observes that as the Indian Act, in so far as it deals with any subject, adopts and enforces English Law almost in its entirety, it is conceived that in matters relating to negotiable instruments which are introduced by the Act (and which do not come within the scope of the Indian Contract or Evidence Act), English Law would be looked to and followed as a guide.

The question of the liability of the maker of a note, who disclaims personal responsibility on the ground that he signed as agent, is, as it seems to me, not a matter untouched by the Act. It is specifically dealt with in S. 28.

The language of the section of the English Act S. 26, no doubt, differs from that of the corresponding section of the Indian Act (S. 28). It declares that a person who signs and adds words to his signature indicating that he signs for and on behalf of a principal, or in a representative character, is not personally liable, while S. 28 of the Indian Act declares that an agent who signs is personally liable unless he indicates on the instrument that he signs as agent or that he does not intend to incur personal liability. It might be said that in view of this difference of language, the onus on the party who seeks to avoid personal responsibility on the ground he signed as agent is heavier under the Indian than under the English enactment. I do not, however, attach importance to this variation of language because I think the Legistature intended in both enactments to re-produce the English Common Law, though the language for the purpose of carrying out their intention is different.

In dealing with this question, we are, in my opinion, warranted in considering the decisions before the Indian Act, bearing in mind that they are only law "in so far as they can be shown to be correct and logical deductions from the general propositions" in the Indian Act, in the same way as an English Court would be warranted in considering English decisions in an English case.

Perhaps the strongest case in the appellant's favour is one since the Act, the decision of the Court of Appeal, overruling, Channel, J., in *Chapman* v. *Smethurst* (2). The Court held that the man who signed was not personally liable, but in that case the facts were very different from those in the present case. There, at the foot of the note, was the rubber stamp of the Company and under those words the defendant wrote the words J. H. Smethurst, Managing Director. Then, it was admitted the defendant had the Company's authority to sign the note. The note was made in the name of the company by a person acting under the authority of the company, as allowed by S. 47 of the Companies Act, 1872. In *Alexander* v. *Sizer* (3), where it was held that the man who signed the note was not personally liable, it was signed "for (certain parties) John Sizer, Secretary"

(1) (1891) A. C. 107=58 L. J. Q. B. 357.

(2) (1909) 1 K. B. 927=78 L. J. K. B. 654.
(3) (1869) 4 Ex. 102=38 L. J. Ex. 59.

Lindus v. *Melrose* (4) was, again, a very different case from this. There the note was signed by certain persons who described themselves as Directors, and it was held that the note was binding on the Company and that the Directors were not personally liable. In *Aggs* v. *Nicholson* (5), the two Directors who signed the note, without additional words, described themselves in the body of the note as Directors of the Society. They were held not personally liable. The case of *Dutton* v. *Marsh* (6) was held to be on the other side of the line, and the parties who signed were held personally liable. In that case, though they described themselves as Directors in the body of the note, they did not promise to pay *on behalf of the Company* and they signed the note without any addition to their signatures, though the Company's seal was affixed at the corner of the note with "witnessed by L. L."

I do not propose to discuss further the numerous authorities cited in the able arguments which were addressed to us. So far as the English cases go, the weight of authority seems to me clearly on the side of the respondent. The question came before the late Mr. Justice Krishnaswami Aiyar in a case, *Aiyathurai Aiyar* v. *Dharmasiva Iyer* (7). The learned Judge held that the man who signed the note was personally liable. In that case, the indications on the note that the man who signed it did not intend to make himself personally liable would seem to have been stronger than the indications in the case before us.

It seems to me that, reading the note in question as a whole, on the construction of the instrument, and on authority, the maker is personally liable.

As to the minor point that the Munsif was wrong in framing an additional issue which raised the question of the liability of the 3rd defendant as maker of the note, I agree with Sadasiva Aiyar, J., that it was open to the Munsif to do this.

A further point was taken that there was no consideration for the note as between the maker and the payee and that the only consideration for the transaction was the debt due to the payee by a third party. In the course which the case took before the Munsif, this point did not arise and was not considered. I do not think we are called upon to consider it now.

I think the appeal should be dismissed with costs.

Ayling, J.—I agree. The point is not free from doubt, but on a careful consideration of the terms of the pro-note, I am of opinion that there is no indication therein that the maker signed as an agent or did not intend to incur personal liability.

Oldfield, J.—I concur in the statement of the law contained in the judgment of the learned Chief Justice. With reference to the wording of the note, it is material not only that the maker describes himself in a manner which does not imply any intention to incur personal responsibility, but also that his promise to pay is unqualified by any reference to his alleged principal. The appeal must be dismissed with costs.

S.N./R. K.

Appeal dismissed.

(4) (1858) 27 L. J. Ex. 326=3 H. & N. 177.
(5) (1856) 25 L. J. Ex. 348=1 H. & N. 165.
(6) (1871) 6 Q. B. 361=40 L. J. Q. B. 175.
(7) (1912) 35 Mad. 588=8 I. C. 843.

A. I. R. 1916 Madras 295

WALLIS, OFFG. C. J. AND SESHAGIRI AIYAR, J.

Ramasami Chetty—Plaintiff—Appellant.

v.

Aligiri Chetty and others—Defendants—Respondents.

First Appeal No. 243 of 1910 decided on 29th October, 1914, against the decree of District Judge, Coimbatore, in Original Suit No. 37 of 1910.

Civil P. C. (5 of 1908), O. 21, R. 63 and O. 38, R. 9—Nature of suit under R. 63 stated—Suit does not abate even if attachment is removed under O. 38, R. 9.

The statutory right under O. 21, R. 63, Civil Procedure Code, is merely to establish the right which the attaching plaintiff claims in the property, *i.e.*, to attach it as the property of the defendant whenever it is his interest to do so. The fact that the attachment before judgment ceases to be operative on the dismissal of the suit by virtue of O. 38, R. 9, of the Code, does not also cause the suit, under O. 21, R. 63, to abate. [P. 296, C. 1.]

S. Swaminadhan—for Appellant.

T. R. Krishnaswami Aiyar for *T. R. Ramachandra Aiyar*—for Respondents.

Judgment.—The plaintiff's attachment was raised and he sued the claimant to establish his right under O. 21, R. 63, of the Civil Procedure Code (formerly S. 283). The District Judge afterwards dismissed the suit, and it is now contended that as the attachment before judgment, if still subsisting, would have been raised as a consequence of the dismissal of the suit pursuant to O. 38, R. 9, of the Code of Civil Procedure, the effect of the dismissal of the suit in which the attachment was made was in effect to cause the suit under O. 21, R. 63 to abate. No authority has been cited for this novel proposition which we are altogether unable to accept. The statutory suit under O. 21, R. 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is the right to attach the property in question as the property of the defendant whenever it may be his interest to do so and the effect of not suing would be to debar him from claiming to attach such property at any future time. The fact that the attachment effected by him would, if it had not been raised previously, have come to an end by the dismissal of the suit, does not affect his right to sue under O. 21, R. 63. The appeal must be allowed and the case remanded for disposal according to law.

The costs will abide the result.

S. N./R. K.

Appeal allowed ; Case remanded.

A. I. R. 1916 Madras 296

Full Bench.

WALLIS, C. J., AYLING AND SADASIVA AIYAR, JJ.

Guda William—Plaintiff.

v.

Guda Karunamma—Defendant.

Referred Case No. 10 of 1914, decided on 18th March. 1915, made by Dist. Judge, Godavari, in Original Suit No. 15 of 1914.

(a) Divorce Act (4 of 1869), Ss. 16, 17, and 69—(Per Wallis, C. J. and Ayling, J.)—Reference gives jurisdiction to High Court—Petitioner's appearance is immaterial. (Sadasiva Aiyar, J., Contra.)

Per *Wallis, C. J. and Ayling, J.*, (*Sadasiva Aiyar, J.*, dissenting)—The jurisdiction of the High Court to confirm the decree in a divorce suit arises immediately upon a reference. To complete that jurisdiction it is not necessary that there should be a personal appearance of the petitioner before the High Court. [P. 296, C. 2.]

Per *Sadasiva Aiyar, J.*—The order passed in a divorce case by a District Court is not a decree *nisi*. It is only a divorce decree passed by a High Court on its original side which is called a decree *nisi*. Under the Divorce Act the person who wants the confirmation of a decree pronounced by a District Judge ought to make an application to the High Court for confirmation and without such application the High Court should not confirm the decree passed by the District Judge. 31 All. 511, Foll. [P. 297, C. 1 & 2.]

(b) Divorce Act (4 of 1869), Woman talking promiscuously is not necessarily prostitute.

The mere fact that a woman talks promiscuously with all, does not show her to be a prostitute, though she may be a coquette or a flirt. 3 Bom. L. R. App. 9, Foll. [P. 298, C. 1.]

(c) Evidence Act (1872), S. 112—Non-access how can be proved stated.

The presumption of a child's legitimacy can be said to be rebutted, if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband before conception had not access to his wife. (1864) 33 L. J. Ch. 345, (1848) 1 H. L. C. 507, Foll. [P. 298, C. 2.]

Wallis, C. J.—It has always been the practice of this Court, since the passing of the Indian Divorce Act of 1869, to post and dispose of decrees sent up from the District Court for confirmation after notice to the parties without requiring the petitioner to appear and move for confirmation. I see no sufficient reason to depart from this practice, which appears to me to give effect to the intention of the Legislature. It was in the interest of poor suitors that jurisdiction in divorce was conferred upon District Judges instead of on a Central Divorce Court as in England, and it would be a restriction of the boon to require a petitioner who has obtained a decree in a District Court, to take proceedings for confirmation in the High Court. The mere appearance of the petitioner would be no protection against collusion which is guarded against by the other provisions of S. 17, and as regards the possibility of the parties having died or come together again subsequent to the decree of the District Court the serving of notice seems a sufficient safeguard.

As to the facts the petitioner has no doubt failed to prove the specific act of adultery shortly after the marriage on which he relied, besides which condonation has been proved. But with regard to the allegation that the petitioner was not the father of the infant born to the respondent in September 1913, the District Judge, who saw the witnesses, has accepted the evidence of witnesses who, if believed, in my opinion sufficiently prove non-access on the part of the petitioner and misconduct on the part of the respondent. The case really turns on whether the husband had access to his wife about the time the child was conceived. The parties had been separated some months before, when at the instance of the missionaries an effort was made to reconcile them. Plaintiff's 2nd witness speaks to going with the petitioner to her mother's house and finding her absent and to staying the night and their going over to Achutapuram, where she was keeping a night school for adult men as well as boys. There does not seem to have been any opportunity of access on that occasion, and the evidence, in my opinion, negatives anything of the kind. The fact of her having previously to this contracted a venereal disease which she did not accuse her husband of having given her and of her keeping the night school shows the sort of woman she was. I think the adultery is sufficiently proved and would confirm the decree.

Ayling, J.—I agree.

Sadasiva Aiyar, J.—This case is described as a "case referred under S. 17 of Act IV of 1869 for confirmation of the *decree nisi* passed by the District Court of Godavari in Original Suit No. 15 of 1914" on the file of that Court. I have to make two remarks in connection with this. In the *first* place, S. 14 of the Act IV of 1869, does not call the decree pronounced by the District Court a *decree nisi*. It is only a divorce decree passed by the High Court on its original side which is called a *decree nisi* in S. 16 of the Act. In the *second* place, there is no provision for the District Court referring the decree to this Court. S. 17 merely says "that every decree for dissolution made by the District Judge shall be subject to confirmation by the High Court." I am not aware of any rules passed by the High Court under S. 62 of the Indian Divorce Act enabling the District Court to make any such reference. I might further add that in this case I find that a head clerk of the District Court, as the officer in charge in the absence of the District Judge from the station, has made this reference on the 13th May 1914. Even holding that a reference by the District Court is contemplated by the Act and we are bound to act on such reference, I think we must decline to act on a reference made by the head clerk of the District Court who is left in charge of the administrative duties and of the establishment during the absence of the District Judge.

I further think that even if a reference is admissible and is properly made, the person who wants the confirmation of the decree pronounced by the District Judge ought to make an application to this Court for such confirmation and without such an application, I am inclined to hold with the Full Bench of the Allahabad High Court [see *William Arthur Forshaw* v. *Eunice Geraldine Forshaw* (1)] that we should not confirm the decree passed by the District Judge.

I might be permitted to quote the following from that judgment :

"We are wholly unable to say whether or not the parties have come to terms and arranged their differences. It may be that since the *decree nisi* was passed the petitioner and respondent have co-habited and so the adultery has been condoned." I might further add that it may be that one of the parties has even died after the pronouncement of the decree by the District Court which is now nearly a year old. While I am not prepared to say that we have no jurisdiction to consider this case because there has been no proper reference and there has been no application by the party, I think that the practice might be introduced of requiring an application from the interested party. Most of the Indian Christians are, no doubt, very poor and hence, jurisdiction in divorce matters was given to the District Court, so that the expenses and trouble of going to the High Court of Madras and securing attendance of witnesses there might be avoided. But, in such a momentous matter as confirmation of a divorce, often involving the legiti-

(1) (1909) 31 All. 511 ; 3 I. C. 969.

macy of children, a petitioner might be expected to manifest at least the interest required to apply to the High Court therefor, and if it is too great trouble to go to Madras to put in the application, the rules might provide for his sending it through the District Court.

So much for the preliminary difficulties in this case. On the merits also I am inclined to hold that it is not proved that the respondent has been guilty of adultery. The petitioner (husband) is not at all a straightforward witness, and his story that he caught his wife in adultery with a man (now deceased) in broad daylight in a school house a few days after his marriage is not worth a moment's belief. The respondent is no doubt proved to be a bold, immodest woman. Her talking freely to other males and opening and conducting for sometime a school for adult males do show her to be a coquette and flirt, but I am not prepared to hold that she has lived "the life of a public prostitute" as stated in paragraph 9 of the petition. In fact there is no evidence at all of her having led a life of promiscuous intercourse with all who sought her. [See *Roe* v. *Roe* (2) as to who is a public prostitute]. That the petitioner went to her residence in January 1913 is admitted by the petitioner. He says he had no intercourse with her on that occasion. She says, on the other hand, that he had and she attributes to him the paternity of the child born to her in September 1913, between eight and nine months after this visit. He, no doubt, went to her with mediators in order to persuade her to live with him. I, however, do not think it so very improbable that she did allow him to have intercourse with her at that time, though she refused to return to his place to live with him continuously. I am not prepared to brand the child born to her in September 1913 as a child born of the adultery of its mother with some unknown paramour, having regard to the stringent provisions of S. 112 of the Evidence Act. That the mediator witness says that to his knowledge there was no access between the petitioner and the respondent when he went to her in January 1913, of very little value. In *Atchley* v. *Sprigg* (3), it was said that the presumption of a child's legitimacy can be rebutted "if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband, whether before or after marriage, had not access to his wife." In the *Barony of Saye and Sele* (4), it was held that circumstantial evidence showing that the husband and wife were living separately from each other at such a distance that they could not have had intercourse during the three or four months during which alone the child could have been begotten was sufficient evidence. I do not think that in this case any facts proving non-access beyond reasonable doubt are proved, and I am not prepared on the mere denial of the petitioner to hold that he had no access to his wife in January 1913. I might add that there is clear evidence in this case that the petitioner, who was anxious to get at his wife even in March 1913, has since begun to love another native Christian woman and is, therefore, anxious to get rid of the respondent and that he is not a person of much delicacy of feeling. I would, therefore, on the merits also refuse to confirm the decree.

By the Court.—Following the opinion of the majority the decree is confirmed.

Decree confirmed.

(2) (1869) 3 B. L. R. App. 9.
(3) (1864) 33 L. J. Ch. 345.

(4) (1848) 1 H. L. C. 507.

A. I. R. 1916 Madras 298

AYLING AND TYABJI, JJ.

Avula Charamudi – Defendant – Appellant.

v.

Marriboyina Raghavulu and *another*—Plaintiffs—Respondents.

Second Appeal No. 2058 of 1913, decided on 1st March 1915, from the decree of Dist. Judge, Nellore, in Appl. Suit No. 68 of 1910, dated 2nd January 1913.

Transfer of Property Act (4 of 1882), S. 14—Agreement to sell creates no interest in land and hence does not come within rule of perpetuities.

The rule against perpetuities is applicable only in reference to an attempt to create an interest in land. [P. 303, C. 1.]

No interest in land is created by an agreement to sell the land, still less by reason of there being a possible claim to have an agreement for sale specifically enforced as against a

transferee with notice of the agreement and therefore, such an agreement is not within the rule against perpetuities. [P. 303, C. 1.]

A. Krishnasami Iyer and *M. Subbaraya Iyer*—for Appellant.

T. V. Muthukrishna Iyer for Respondents.

Judgment—It has been argued before us that the agreement, Exhibit G, on which the plaintiff sues for a reconveyance of the land to him, is void as being opposed to the rule against perpetuities, inasmuch as no period is fixed during which the plaintiff may claim to have the land reconveyed: the argument is that under Exhibit G the land would be tied up for an indefinite period as the plaintiff would be entitled to assert his right at any time, however remote. The short answer to this argument is that the land is not tied up by Exhibit G; and that there is a mere personal contract between the contracting parties which does not create any interest in the land, though it may have some reference to the land. This answer is met by the contention that if the agreement to reconvey contained in Exhibit G is a valid contract, then specific performance of it could be had under the Specific Relief Act, S. 27 (*b*), from any subsequent purchaser of the land who had notice of it; that, therefore, the agreemeat to reconvey must be taken to be a covenant running with the land and as such amounting to an interest in land; and that if so, the attempt to create such an interest for an indefinite period of time must fail under the Transfer of Property Act, 8. 14, which must be applied as the rule of Hindu Law is not less stringent than that contained in the section: *Ramasami Pattar* v. *Chinna Asari* (1).

Our attention was drawn to *London and South Western Railway Co.* v. *Gomm* (2), which has been referred to or followed in India in *Kolathu Aiyer* v. *Rangavadhyar* (3), *Haris Paik* v. *Jahuruddi Gazi* (4), *Nobin Chandra Soot* v *Nabab Ali Sarkar* (5), *Kalimuddin Bhuya* v. *Reazuddin Ahmed* (6).

(1) (1901) 24 Mad. 449.
(2) (1882) 20 Ch. D. 562=51 L. J. Ch. 530.
(3) (1915) 38 Mad. 114=18 I. C. 203.
(4) (1898) 2 C. W. N. 575.
(5) (1902) 5 C. W. N. 343.
(6) (1909) 4 I. C. 743.

The decisions of English Courts cannot be followed without caution inasmuch as the rules of law and equity relating to covenants running with the land as laid down in *Tulk* v. *Moxhay* (7), with the limitation placed upon those rules by such decisions as *Haywood* v. *The Brunswick Permanent Benefit Building Society* (8) and *London and South Western Railway Co.* v. *Gomm* (2), may have a different effect from the law which has to be enforced in British India by reason of S. 27 *b*) of the Specific Relief Act and S. 40 of the Transfer of Property Act. It may be that covenants which would not run with the land in England would in British India be enforceable as against persons having notice of them. We refer, however, to English decisions not so much for taking from them the law as if it were directly and in terms applicable to India, but for the elucidation of some of those general principles with which the statutary law of India deals.

The first point to be borne in mind in connection with the questions that arise in this appeal is expressed with very great clearness by Farwell, L. J., in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers* (9):

"It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities. It is sufficient to refer to *Witham* v. *Vane* (10) in the House of Lords. There, there was a covenant by a purchaser of lands in fee simple contained in the conveyance made to him by the vendor, that the purchaser, his heirs, appointees, and assigns will from time to time and at all times pay, or cause to be paid, to the vendor, his heirs, executors, administrators, or assigns, the sum of six pence for every chaldron of coals wrought and gotten out of the lands conveyed, and which shall be shipped for sale." That was entered into by the Earl of Darlington (afterwards Duke of Cleveland) in 1824. He died in 1842; the benefit of the covenant was assigned to certain other persons, and they sued the executors of the Duke in the year 1883, and this question of perpetuity was

(7) 1848) 2 Ph. 774.
(8) (1882) 8 Q. B. D. 403=51 L. J. Q. B. 73.
(9) (1910) 1 Ch. 12=79 L. J Ch. 150.
(10) (1883) Challis on Real Property, 2nd Ed., App. V., p. 401 (3rd Ed., App, V., p. 440, *Ed.*)

swept aside as having no relevency whatever to a mere personal covenant, although such covenant was connected in some way, at any rate, with the land. But the fact that there is some connection with reference to land does not make a personal contract by *A*, less a personal contract binding on him with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both ; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.

"The real answer", continues Farwell, L.J., "to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case. So far as I see I should have no hesitation whatever in decreeing specific performance. There certainly is no honesty in the Company's case, there is a clear covenant by them to do a certain thing when called on by a particular person. They are so called on by that person They have had the benefit of the covenant in the reduction of the amount of money which they have had to pay, and now they refuse to perform their own personal covenant on the ground of perpetuity."

The distinction between an agreement merely personal and an agreement creating an interest in land was not lost sight of in *London and South Western Railway Co.* v. *Gomm* (2), on which the appellant greatly relied.

There a Railway Company had held in 1865 with an agreement by their vendee on behalf of himself "his heirs or assigns, owner and owners for the time being of the land and all other persons who should or might be interested therein ;" the agreement so entered into contained an option to the Railway Company to repurchase at any time. Sir George Jessel, M. R., says, pages 580, 581, "whether the rule as to remoteness applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land ? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract but is only a purchaser from Powel who did. If it is mere personal contract it cannot be enforced against the assignee. Therefore the Company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature."

Sir George Jessel's remarks read in the light of what Farwell, L. J., said in *South Eastern Railway Co.* v *Associated Portland Cement Manufacturers* (9) had reference only to that aspect of the agreement which purported to create an interest in the land ; that aspect alone had any relevance to the question that the Master of the Rolls was considering. But as Farwell, L. J., pointed out, parties may by the same agreement purport to do two things : (1) create an interest in land in perpetuity ; (2) to enter into a personal covenant unrestricted in point of time, the rule against perpetuities cannot be obnoxious to the latter though it invalidates the former.

Lord Justice Lindley in *London & South Western Railway Co.* v. *Gomm* (2) at page 587 said : "This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must see is, upon what legal principles the defendant is bound by a contract into which he did not enter. It is not contended that he is bound by it on the ground that the covenant entered into by Powel runs with the land and binds him at law, but it is said that though it does

not bind him at law it binds him in equity."

"Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor-in-title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants."

The learned Lord Justice then considers which classes of covenants run with the land, in other words, which classes of agreements are enforced in England not only against the person who entered into them but against a purchaser of the land with notice of the agreement entered into by his predecessor-in-title. That portion of his judgment is not directly applicable as we have the law laid down in the Specific Relief Act, S. 27 (*c*), and the Transfer of Property Act, S. 40. He concludes by saying that the agreement then before the Court could be enforced (if at all) as against the defendants only as a covenant running with the land; that the agreement for re-purchase went beyond the doctrine of covenants running with the land laid down in *Tulk* v. *Moxhay* (7), and could not, therefore, be said to be a covenant running with the land, and could not consequently be enforced against a person who did not enter into it. He then agrees with the observations of the other members of the Court that the covenant purports to create an interest in land but that that interest is void for remoteness.

Thus it is clear that the Court was not deciding in *London & South Western Railway Co.* v. *Gomm* (2) upon the personal aspect of the agreement at all. What was then decided was (1) that the agreement could not prevail as between the parties before the Court in any aspect other than that by which it purported to create an interest in land and that in as far as it purported to create an interest in land, it was void for remoteness; (2) that the defendant could not be bound by an agreement to which he was not a party on the ground that it was a covenant running with the land, for the agreement was not of that class which could run with the land not being within the principle laid down in *Tulk* v. *Moxhay* (7). In other words the decision may shortly be thus stated: the agreement either created an interest in the land, or it did not; if it created an interest in land, then it was void for remoteness; if it was merely a personal covenant it did not bind the defendant, who was not a party to it, and was not bound by it under *Tulk* v. *Moxhay* (7).

It seems clear on a consideration of the cases to which we have referred, that very different sets of rules apply according as the juristic act in question creates.

1. An interest in land, or

2. A mere personal contractual liability.

With reference to the former (1) the policy of the law is expressed in the rule against perpetuities, and a transaction (whether it is a contract of a declaration of trust or a bequest) in so far as it purports to create an interest in land is void to the extent that it contravenes the rule against prepetuities: what is void is the interest which is sought to be created so as to come into operation at a remote time, not the contract. If, however, the sole object of a contract is to create such an interest, it is of course wholly void.

With reference to the latter (2) however as Farwell, L. J., pointed out, the rule against perpetuities has no application. A contract which is binding only personally would, in strictness and according to literal import, be enforceable only so long as both the contracting parties are alive; for if one of them is dead, then there is either no person to enforce it, or no person against whom it can be enforced. It would have been meaningless for the law to apply the rule against perpetuities to such a transaction; for the transaction can (in its strictness) prevail for only a fragment of the period mentioned in the rule against perpetuities. Far from limiting the period during which such a transaction is to operate, the law has enlarged the scope of its operation from its strict limits (*viz.*, during the life-time of both contracting parties) so as to bind the representative of the promisors (Indian Contract Act, S. 37).

It is also clear that a contract does not create an interest in land merely because

it has reference to land. This is well recognised in England. In India there cannot be a more emphatic enunciation of this principle than that contained in the Transfer of Property Act, S. 54, last paragraph, which is explained and contrasted with S. 55 (6) (*b*) in *Kurri Veerareddi* v. *Kurri Bapireddi* (11). The law in England seems to be different from that contained in S. 54: *London and South Western Railway Company* v. *Gomn* (2). Moreover the scheme of the Indian Law differs widely from that of English Law. The Indian Legislature has given a great extension to the personal liability of parties having notice of a contract made by one under whom they claim; though such liability is tempered by the discretion of the Court that is asked to enforce specific performance. On the other hand, the Indian Legislature has been stringent in allowing interests to be created in land either for remote periods, or without registered documents. In any case having an interest in land or any other property implies having existing rights in them: and that is very different from having personal rights against some one who may at the discretion of the Court be required by law to do some specific act or in lieu of it to give compensation.

It is argued that because under S. 27 (*b*) of the Specific Relief Act the contract may be enforced against transferees with notice, therefore, it creates an interest in the land. But in the *first* place if, as between the parties themselves a contract for sale does not create an interest in land, it is inconceivable that an interest should be created when the liabilities under the contract are transferred to a third party. *Secondly*, S. 27 (*b*) read with S. 22 of the same Act only gives a discretionary power to the Court to enforce a contract specifically; it is difficult to see how an interest in land can be considered to be created when it is in the discretion of the Court whether to recognise it or not. If an interest already exists there can be no power in the Court to take away the existing rights of the parties.

Moreover assuming that under S. 27(*b*) some interest might be created in the land itself which can avail to a limited extent as against transferees, it does not follow that the personal liability of the contracting parties is lessened because certain rights *in rem* are attempted to be created and the attempt is unsuccessful by offending the rule against perpetuities. The argument as put by the appellant is self-destructive. For if any interest in land may be created by operation of S. 27 (*b*), then that may be a ground for upholding that interest as against transferees, and it may be that the transaction by virtue of which the interest arises, *viz.*, the contract, may thus have an extended operation: the section cannot, on the assumption that it creates an interest in land affect the operation of the contract in its personal aspect. If the object of the section is assumed to be to give an enhanced efficacy to a contract by the creation of interest in the property itself, in addition to mere personal rights and liabilities, the section cannot be utilised for taking away the binding force of the contract as between the parties themselves.

There are observations in *Kolathu Aiyar* v. *Rangavadhyar* (3) to the effect that one who has obtained a promise for the conveyance of land has by virtue of the Specific Relief Act, S. 27 (*b*), and Trusts Act, S. 91, "a substantial interest in it," such an interest is apparently meant as is implied in S. 14 of the Transfer of Property Act. These observations were perhaps not necessary for the decision, as in the earlier portion of the judgment it is intimated that the intention of the parties as appearing from the contract was that the heirs of the covenantor should not be bound by it and the suit was against the heirs, *Stocker* v. *Dean* (12) Indian Contract Act, S. 37, paragraph 2. In any case we are unable to reconcile these observations with S. 54 of the Transfer of Property Act and *Kurri Veerareddi* v. *Kurri Bapireddi* (11).

The two cases decided in Calcutta, *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (5) and *Kalimuddin Bhuya* v. *Reazuddin Ahmed* 6), are not easily reconcilable on principle. The attempt in the latter to distinguish the former on the ground that the application of the rule against perpetuities may depend upon whether the person sued is the original covenantor

(11) (1906) 29 Mad. 336.

(12) (1852) 51 E. R. 739=16 Beav. 161.

or one on whom the interest had devolved, cannot be accepted in the face of the authorities. Thus in *Witham* v. *Vane* (10), decided by the House of Lords, the covenant was enforced as between the executors of one party to the contract and the assignees of the other, the ground of decision being that the covenant sought to be enforced was a personal contract and there was no reason why specific performance could be refused. On the other hand if the right that is sought to be enforced depends upon the existence of an interest in the land, and that interest itself is void in law, it does not matter whether the persons that are before the Court are those who have themselves been parties to the transaction attempting to create an interest, or that they are strangers or transferees.

Our decision must, therefore, be that the rule against perpetuities is applicable only in reference to an attempt to create an interest in land, that no interest in land is created by an agreement to sell the land, still less by reason of there being a possible claim to have an agreement for sale specifically enforced as against a transferee with notice of the agreement. The lower Courts were, therefore, right in holding that the agreement for re-sale now in question was enforceable and the appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 303

OLDFIELD, J.

Gangu Reddi —Petitioner.

v.

C. Samarapathy Mudali—Respondent.

Criminal Rev. Case No. 381 of 1913, and Criminal Rev. Pet. No. 307 of 1913, decided on 19th September 1913, against the order of 3rd Presdy. Magte., George Town in Appln. No. 4763 of 1913, dated 29th April, 1913.

Criminal P. C. (5 of 1898), S. 203—Dismissal of complaint must be based on exercise of judicial discretion—Undesirable result or complainant's conduct on motive is irrelevant—Order without finding of falsity of complaint will be interfered with under S. 15 of charter—Quaere—Whether High Court can revise order under S. 203.

The decision whether there is sufficient ground for dismissing a complaint under S. 203 of the Code of Criminal Procedure must be reached by the exercise of discretion based on judicial considerations. [P. 303, C. 2.]

That the Magistrate considered the probable result of proceeding to be undesirable or the motives and conduct of the complainant to be discreditable are not relevant considerations. In the absence of any finding that the complaint is false or unsustainable on the evidence likely to be available, the passing of an order of dismissal would constitute an irregularity with which the High Court has, under S. 15 of the Charter Act, jurisdiction to deal. [P. 304, C. 1.]

Quære:—Whether the High Court has power under the Criminal Procedure Code to revise an order of dismissal of complaint under S. 203. [P. 303, C. 2.]

V. Viswanatha Sastri for Petitioner.

T. Pattabhirma Aiyar—for Respondent.

Order.—A preliminary objection has been taken that the petition will not lie under the Criminal Procedure Code with reference to *Debi Bux Shroff* v. *Jutmal Dungarwal* (1), and previous cases including *Charoobala Dabee* v. *Barendra Nath Mozumdar* (2).

The course of authority in Calcutta has not been consistent. In this Presidency, the point was raised in the case reported at 2 Weir 255, but was not decided. I have, however, allowed the petitioner to amend his petition by inserting a reference to S. 15 of the Charter Act. And, as I find that it can be supported on the merits with reference to that provision, it is not necessary to decide whether I have jurisdiction under the Criminal Procedure Code also.

The petitioner charged the accused with offences punishable under Ss. 498 and 497, Indian Penal Code. The Magistrate declined to grant summons, in effect dismissing the complaint under S. 203 of the Criminal Procedure Code. His recorded reasons included nothing resembling a finding that the charges were false. They were only that gross delay had occurred and that the charges were made for ulterior and improper motives. S. 203 authorises the Magistrate to dismiss in case he finds no sufficient ground for proceeding. But the decision whether there is sufficient ground must be reached by the exercise of discretion, based on judicial considerations. That the Magistrate considered

(1) (1906) 33 Cal. 1282.
(2) (1900) 27 Cal. 126.

the probable result of proceeding undesirable or the motives and conduct of the coplainant descreditable are not relevant considerations. *In the matter of the petition of Ganesh Narayan Sathe* (3). In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available, the passing of the order of dismissal constituted an irregularity with which this Court has under S. 15 of the Charter Act jurisdiction to deal.

The order must be set aside and the complaint remanded to the Chief Presidency Magistrate for disposal according to law by him or such other Presidency Magistrate as he may direct.

S. N./R. K.

Order set aside.

(3) (1889) 13 Bom. 590.

A. I. R. 1916 Madras 304 (1)

SPENCER, J.

Doraiswamy Mudaliar—Petitioner.

v.

Sudarsana Chariar—Respondent.

Criminal Rev. No. 727 of 1914, and Criminal Rev. Petn. No. 610 of 1914, decided on 15th January, 1915, from the Order of Joint Magte., Satur, in Misc. Proceedings No. 10 of 1914.

Criminal P. C. (5 of 1898), Ss. 133 and 137—Order based on personal opinion from inspection is bad—Opportunity to the other side to adduce evidence must be given.

In consequence of a representation from the respondent that the hayricks on the petitioner's premises were a nuisance and likely to cause conflagration, the Magistrate issued a conditional order under S. 133, Criminal Procedure Code. The petitioner admitted the existence of the hayricks, but denied that they were a nuisance. The Magistrate from his own inspection decided that they were a danger to adjoining houses and made the order absolute without taking any evidence:

Held, that the Magistrate should not have made the order absolute on his own opinion formed by inspection, but should have called on the respondent to adduce evidence that the hayricks constituted a nuisance and the order must, therefore, be set aside. 11 Bom. 375; 31 All. 453, ref. to. [P. 304, C. 2.]

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai*—for Petitioner.

K. B. Ranganadha Aiyer for *G. S. Ramachandra Aiyar*—for Respondent.

P. R. Grant—for the Government.

Order.—S. 137 of the Criminal Procedure Code requires that the Magistrate shall take evidence, if a person ordered to remove a nuisance appears and shows cause against the order.

In this case no evidence was let in either for or against the order.

The petitioner admitted the existence of hayricks on his premises, but he denied that they were a nuisance.

The Magistrate seems to have decided from his own inspection that they were a danger to adjoining houses. The conditional order under S. 133 was issued in consequence of a representation in which it was alleged (1) that the drainage water caused bad odours (2), that the hayrick was likely to cause conflagration. In these circumstances, I think the Magistrate should not have made the order absolute on his own opinion formed by inspection, but should have called on the first party, Sudarsanachariar, to adduce evidence that the hayricks constituted a nuisance.

Vide *In the matter of the petition of Mahadaji Sadashiv* (1) and *Hingu* v. *Emperor* (2). The order does not satisfy the requirements of the section. I set it aside and refer the matter back to the Magistrate to proceed according to law.

S. N./R. K.

Order set aside.

(1) (1887) 11 Bom. 375.
(2) (1909) 31 All. 453=3 I. C. 482.

A. I. R. 1916 Madras 304 (2)

AYLING AND TYABJI, JJ.

Tadiboyina Peda Punnayya—Defendant—Appellant.

v.

Debbakutti Kattamma and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 69 of 1914, decided on 5th March 1915, against the decree of Dist., Judge, Guntur, in A. S. No. 410 of 1912.

Hindu Law—*Stridhanam*—Daughters held preferential to sons in respect of widow's acquisitions.

Where a woman purchased certain immoveable property and paid the purchase-money by mortgaging the same and subsequently redeemed it:

Held, that the property was acquired by her wits and was her *stridhanam* property and, therefore, devolved on her daughter in preference to her sons. 28 Mad. 1, Foll. 34 All. 234 (P. C.) dist.

P. Narayanamurthi—for Appellant.

V. Ramesam—for Respondents.

Ayling, J.—The plaintiff in this case (1st respondent) sued to set aside a deed of exchange, dated 1st June 1911, executed by her father (2nd defendant) in favour of the 1st defendant (appellant) in respect of certain lands, the property of her (plaintiff's) deceased mother, Subbamma, and which she claims by inheritance as the latter's heir. The District Munsif dismissed the suit on the ground that the property passed on the death of Subbamma not to the plaintiff, but to plaintiff jointly with her brothers who are no parties to the suit, and that the suit was not maintainable by the plaintiff alone. The District Judge, differing from the Munsif, held that the plaintiff alone succeeded to the property on her mother's death and finding the other disputed point in favour of the plantiff, gave her a decree.

The sole question argued before us is, whether the plaintiff is the sole heir of her mother in respect of the plaint property and as such entitled to maintain the suit alone.

Subbamma purchased the property on the 27th September 1905 by Exhibit B for Rs. 200, which appears to be very much less than its real value. She raised the sale price by means of a mortgage of the very same property. This sounds somewhat improbable; but it is the finding of the District Munsif which was not questioned either in the lower Appellate Court or before us and we must take the facts to be so. The plaintiff's mother in effect acquired this property by her wits: and it must, in my opinion, be regarded as her separate acquisition.

The question is whether property so acquired descends to her daughter in preference to her sons in accordance with the method of devolution laid down in Chapter II, S. 11, clauses 12 and 13 of the *Mitakshara*; or, in other words, whether it comes under what Mr. Mayne called the mysterious word "adyam" in the text of Yajnavalkya therein dealt with.

The leading case on the point in this Presidency is the Full Bench decision *Subramanian Chetty* v. *Arunachelam Chetty* (1). The property in that case had been acquired by a widow by means of savings out of monies received by her under a maintenance decree, and it was held to descend to the widow's own heirs in the female line, just as if it were a *stridhanam* in the narrowest sense of the term.

The present case is, of the two, the stronger from the plaintiff's point of view. The learned Vakil for the appellant in fact admits that if the above ruling is followed our decision must go against him; but contends that its authority has been destroyed by a later decision of the Privy Council reported as *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2), on which he himself relies.

Now the decision in *Subramanian Chetty* v. *Arunachelam Chetty* (1) seems to me to be entitled to the very greatest weight. It was that of a Full Bench of this Court, the main judgment being delivered by a very eminent Hindu Judge, then officiating as the Chief Justice. The question was evidently most elaborately argued by Vakils on both sides of quite phenomenal ability and repute. The decision has been followed ever since and was based on the *Mitakshara*, universally recognised as the leading authority in this part of India. I do not think we should be justified in departing from the principles laid down in this decision, unless it is quite clear that adherence to it would be counter to the view taken by an even higher tribunal.

A careful consideration of the judgment of the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2) does not seem to me to necessitate anything of the kind. The question for decision in that case was thus propounded by Lord Robson who delivered the judgment (page 238): "whether immoveable property obtained by a Hindu widow on partition under the *Mitakshara* Law is part of her *stridhanam* in the narrow sense of that word, indicating her separate property or peculium which passes on her death to her own heirs; or is merely part of her *stridhanam* in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship."

(1) (1905) 28 Mad. 1.

(2) (1912) 34 All. 234=14 I. C. 100=39 I. A. 121 (P. C.).

Such a question could never arise in this Presidency where the custom of allowing a share on partition to the widow of a deceased co-parcener does not obtain; the effect of this decision was simply to place property thus acquired by a widow on the same footing as regards devolution of property acquired by inheritance. That property acquired by inheritance is an exception to the general rule laid down by Vignaneswara is recognised by Subrahmania Iyer, officiating Chief Justice in the Full Bench case.

Reliance is placed by appellant's Vakil on the general remarks regarding Chapter II, S. 11, of the *Mitakshara* to be found on pages 239 and 240 of the report. The effect is simply this. Their Lordships say that Yagnavalkya's language is open to the meaning that a woman's property of *whatsoever kind* descends always to her own heirs. They say: "It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai* (3), 'most of the old commentators recognise, with regard to the property of a woman, whether called *stridhanam* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition.'"

Now the Full Bench decision of this Court does not by any means proceed on the construction that a woman's property, of whatever kind, always descends to her heirs; as already pointed out, one important exception (property acquired by inheritance) is specifically recognised. On the other hand, their Lordships of the Privy Council do not go so far as to say that the dictum of Vignanesvara regarding property derived from the additional sources specified in clause 2 of the section is devoid of authority. Then in the course of their judgment they are careful to explain the very limited question for their determination (the devolution of a woman's property acquired by partition) and as I understand them, they go no further in the passage relied on than to point out that the *Mitakshara* passage should not be regarded as an authoritative and conclusive rule of law placing all kinds of woman's property on the same footing as regards devolution. What their decision would have been regarding the devolution of property acquired in the way the suit property was acquired, it is impossible to say. I, therefore, am of opinion that the Privy Council decision is no authority for refusing to follow the ruling in *Subramanian Chetty* v. *Arunachelam Chetty* (1)

I would, therefore, dismiss the second appeal with costs.

Tyabji, J.—The question in this appeal is whether the plaintiff, who is the daughter of one Subbamma, is entitled to the property referred to in the plaint as against her brothers. It has been argued before us with reference to the questions (1) whether the property must be considered to be the *stridhanam* property of the said Subbamma and (2) whether the incidents annexed to this property, so far as devolution and succession are concerned, must be determined by the rules prevailing in regard to *stridhanam* property or whether some other rule of succession must be applicable to it.

The property in question was, it is admitted, acquired by Subbamma without the aid of any funds derived either from her husband or from any third party. It has been found that she purchased it and paid the purchase money by means of a loan secured on the mortgage of the very property which she purchased, and that subsequently the loan was paid off and the mortgage redeemed.

The texts relating to *stridhanam* property have often been the subject of interpretation, and they have recently been considered by the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2). The argument before us has been that the property in question cannot be considered to be the *stridhanam* property of Subbamma, inasmuch as it does not fall within any of the six specified clauses of what has been termed strict *stridhanam*. It is beyond dispute that the property was not given to Subbamma by (1) the father, (2) the mother, (3) the husband or (4) a brother or (5) received by her at her nuptial fire, (6) or presented to her on her husband's marriage to another wife; and the only question is whether it can fall under the final word "adayam" occurring in Yajnawalkya's description of *stridhanam*, which word, in the light of judicial interpretation, may be rendered as "and the like." The

(3) (1903) 25 All. 468; 30 I.A. 202 (P.C.).

argument for the appellant has been that the interpretation of that expression "adhyam" or "and the like" by *Mitakshara* cannot now be accepted, that as that interpretation has been made to include property acquired in five different modes, namely by (*a*) inheritance, (*b*) purchase, (*c*) partition, (*d*) seizure or (*e*) finding, and as there are decisions [See *Sheo Shankar Lal* v. *Debi Sahai* (3)] binding upon this Court that property acquired by a woman by inheritance and by partition does not form her *stridhanam* in such a sense that on her death it passes to her *stridhanam* heirs in the female line to the exclusion of males-therefore it must follow that property acquired in any of the three modes referred to by the author of *Mitakshara* is not *stridhanam* and in particular that property acquired in the mode in which Subbamma acquired her property should also be excluded from *stridhanam* property in the said sense.

The real question before us, however, seems to be, what is the rule of succession applicable with referenee to this property of which Subbamma died possessed. It seems to me that the decisions holding that, where a woman has inherited property or acquired it in the course of partition she does not form a stock of descent, but that she is to be considered to have held it as limited owner and that succession is to be traced again as from the last full owner decisions to that effect are not sufficient to form the basis on which we ought to proceed for the purpose of the decision in the present case.

In *Subramanian Chetty* v. *Arunachalam Chetty* (1) the underlying principle is more than once suggested, or I might say assumed, to be—whether the property in question was at the absolute disposal of the woman. On page 5 Sir Subramania Iyer says: "In the absence of any clear provisions of Hindu Law, defining the character of her interest in the income, it must, on general grounds, be held that what becomes vested in her own right and what she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate in every sense and devolving as such." On the other hand on page 6 he says: "No doubt it is now settled that, notwithstanding Vignaneswara's authority, property inherited by a female from a male or a female would not pass to her own heirs, that is to say, the woman so inheriting takes a limited and qualified estate with reverter annexed to it."

If this be the principle, then it is possible to understand and reconcile the decisions restricting property which may be described as *stridhanam* property excluding, therefore, such property as a woman has inherited or acquired by partition; for in the case of property acquired by inheritance or partition, it may be assumed on general principles that it was intended that the woman should take only a limited interest therein and that after providing for her maintenance thereout during her life-time, it should revert to the heirs of the last full owner.

With reference to the property now in question, however, it is difficult to see how it can be said to revert, inasmuch as Subbamma cannot, by any stretch of the principle to which I have just alluded, be considered to have acquired this property only with limitd rights, nor can the rights of any third person be so extended as to allow of our proceeding on the basis that during the life of Subbamma they had even any inchoate right in the property.

In this connection the following text and comment on it taken from *Subramanian Chetty* v. *Arunachalam Chetty* (1) is particularly pertinent: "Still more to the point," says Sir Subramania Iyer, "is the text of Devala: 'Her subsistence, her ornaments, her perquisites and her *gains* are the separate property of a woman.' This is quoted and relied in the Digests of Bengal, Benares and Southern Schools such as the Daya Bhaga (Chapter IV, S. 1 verse 15), the Viramitrodaya (Chapter V, part I, S. 7), the Madaviya (Burnell's Translation, page 46) and the Saraswati Vilasa (Foulke's translation, S. 276, page 57). Compare also the Smrithi Chandrika, Chapter IX, S. 1 placita 6 to 10. This text is certainly not to be confined, as suggested on behalf of the defendant, to gifts for maintenance made out of affection, for, as pointed out by Dr. Jolly (Hindu Law of Partition, Inheritance and Adoption, page 236), the Sanskrit term Vritti (subsistance) in the text has been understood by commentators to include what is given by the heirs, and in *Manilal Rewadut* v.

Bai Rewa (4) arrears of maintenance recovered by a wife under a decree against her husband were held to be *stridhanam*, though *aparibhashika stridhanam* with reference to the distinctions peculiar to *Mayukha*."

What then is the rule of succession applicable to property which must be taken to have been the absolute property under the control of a woman governed by Hindu Law—property with reference to the succession to which it was conceded before us that the woman must be taken to be the stock of descent? It seems to me that for the reasons indicated in *Subramanian Chetty* v. *Arunachellam Chetty* (1), in the case of property found to be the absolute property of a woman under her entire unfettered control there ought to be only one rule of succession recognized in Madras, namely, the rule of succession with reference to *stridhanam* property. The learned Pleader for the appellant had very great difficulty in suggesting any other rule as being applicable. It was impossible for him not to concede that Subbamma must be taken to be the stock of descent and his argument could, therefore, be only treated, on the basis that Subbamma's heirs must be taken to be her sons either in preference to, or conjointly with, her daughter. It seems to me to be impossible to give effect to a rule of law which cannot even be stated with certainty by the person who desires to rely upon it. The only authorities that could be cited in favour of the nebulous suggestion made by the appellant were drawn from Bombay and based on the *Mayukha*—a text which, it is admitted, is not prevalent in Madras. This fact and the great weight due to *Subramania Chetty* v. *Arunachellam Chetty* (1) enable me to omit from consideration the decisions given by the Bombay High Court, although Westropp, C. J., and West and Telang, JJ., took part in those decisions, *Vijiarangam* v. *Lakshman* (5), *Manilal Rewadut* v. *Bai Rewa* (4).

For the reasons that I have given, I am of opinion that the lower Appellate Court was right in applying the *stridhanam* rule of succession to the property in question, and agree, therefore, that the appeal should be dismissed with costs.

S. N./R. K.

Appeal dismissed.

(4) (1893) 17 Bom. 758.
(5) (1871) 8 Bom. H. C. R. 244.

A. I. R. 1916 Madras 308

TYABJI, J.

Kuthalidath Narayan Mootha and *others*—Petitioners,

v.

Cochin Sircar—Respondent.

Civil Revn. Petns. Nos. 510, 511 and 512 of 1912, decided on 16th October, 1913, against the Orders of Sub-Judge, South Malabar, in O. Suits Nos. 32, 40 and 26 of 1911.

Civil P. C. (5 of 1908), S. 86—Scope of S. 86—It is exhaustive—Whether sued as prince or otherwise if he is unwilling to be brought on record—S. 86 applies.

S. 86 of the Civil Procedure Code definitely lays down in what cases Municipal Courts have the power to adjudicate upon any matters whatsoever as against Princes and Chiefs referred to in the section. S. 86 is exhaustive and it applies when a Prince or Chief is to be brought on record against his will, whether he is sued as Prince or Chief or in any other capacity.

[P. 309, C. 1.]

T. R. Ramachandrier—for Petitioners.

C. V. Ananthakrishnier—for Respondent.

Judgment.—The question in this case is whether the Subordinate Judge was right in ordering the name of the 1st defendant as respresenting the Rajah of Cochin to be struck off from the record. He made this order because he was of opinion that S. 86 of the Civil Procedure Code applied and that the Rajah of Cochin could not accordingly be sued. It is admitted that the consent of the Governor-General-in-Council for suing the Rajah of Cochin has not been obtained and that if the section applies, the Subordinate Judge's order is correct.

It was argued before me, however, that in this case the Rajah of Cochin was sued not as such Rajah, but as Trustee of the temples referred to in the plaint and that S. 86 applies only in cases where a prince or chief is sued in his capacity as such prince or chief. I am unable to accede to this argument. I see nothing in S. 86 to warrant a prince or chief being brought on the record except on the terms referred to in S. 86. The

section seems to me to be exhaustive with reference to the question when such a chief or prince can be brought on the record against his wish. I see nothing to support the contention that the question whether or not a chief or prince can be brought on the record depends upon the relief sought or upon the question whether the acts alleged to constitute the cause of action are of a sovereign or a private character. It seems to me that S. 86 definitely lays down in what cases Municipal Courts have the power to adjudicate upon any matters whatsoever as against such princes or chiefs as are referred to in the section. It was held in *Maharajah of Jaipur* v. *Lalji Sahai* (1) that the Governor-General-in-Council has no power to give his consent to a suit except in the three instances specifically referred to in clauses (*a*), (*b*) and (*c*) of the section and that if leave is granted in cases not falling within any of the three clauses, Courts of Law are required to dismiss the suit as against the prince or chief.

As the question is of importance, I think it is necessary to refer to the authorities, in order to explain rather than to support the view that I have taken of the construction of S. 86, for the section seems to me to be clear in itself. The general rule of International Law is thus stated in Westlake on Private International Law:—"Foreign States, and those persons in them who are called sovereigns, whether their title be Emperor, King, Grand Duke, or any other, and whether their power in their States be absolute or limited, cannot be sued in England on their obligations whether *ex contractu*, *quasi ex contractu*, *ex delicto*;" 5th Edition (1912 page 271. The apparent exceptions to that general rule, so far as the English Courts are concerned, are stated in the same book, and in *Mighell* v. *Sultan of Johore* (2). It seems to me that S. 86 of the Civil Procedure Code lays down the same general rule with certain exceptions specified and clearly defined in the section itself, which exceptions are of a legislative extension of the jurisdiction ordinarily exercised by Municipal Courts and are made to depend upon the consent of the Governor-General-in-Council being previously obtained. The general rule of International Law just referred to by me was lateiy re-stated in *Statham* v. *Statham & His Highness the Gaekwar of Baroda* (3). In that case the question was whether His Highness the Maharaja, Gaekwar of Baroda could be made a party to proceedings in the Court of England against his will; and it was laid down in the clearest terms that that course could not be adopted. It was not alleged that the question whether or not the Gaekwar could be sued in England depended upon the nature of the cause of action, or upon whether he was purported to be sued in his private or in his sovereign capacity and yet these contentions could have been raised on the facts in that case if they could have furnished any answar to the objection.

The cases, relied upon by the learned Pleader who appeared for the petitioner, seems to me to furnish very little assistance for the decision of the point with which I have now to deal. The first case relied upon by him was that of *Chandu Lal* v. *Awad* bin *Umar Sultan* (4), in which Mr. Justice Strachey expressed the view that it is in the power of the prince or chief to waive the provisions of S. 86 and submit himself to the jurisdiction of the Courts of British India.

It is not alleged that there was any waiver in the present case. But it is argued that if waiver can give jurisdiction to the Court, then it is implied that the exceptions contained in the clauses (*a*), (*b*) and (*c*) to the general rule in S. 86 are not exhaustive—in other words that the sole exceptions to the general rule are not those specifically mentioned in S. 86 itself; and that just as waiver may be added to the exceptional cases in which the Courts have jurisdiction over independent sovereigns, so also another exception may be made and that one such other exception is the case when the sovereign is sued in his private capacity and not as sovereign. As I understand, however, Mr. Justice Strachey's decision, it is to the effect that, though S. 86 provides certain exceptions to the general law that sovereigns may not be sued, that general law is in itself subject to the proviso that the sovereign may himself waive his

(1) (1907) 29 All. 379.
(2) (1894) 1 Q. B. 149; 63 L. J. Q. B. 593.
(3) (1912) Probate 92=81 L. J. P. 33.
(4) (1897) 21 Bom. 351.

right of questioning the jurisdiction of Municipal Courts. Therefore, assuming that this argument for the petitioner can have any force in the construction of the section, it can certainly have no force unless it is shown that the alleged exception is recognised in International Law as restricting the scope of the general rule just in the same way as the exception about waiver is recognised. But in the first place, I do not think that the ruling of *Chandu Lal* v. *Awad* bin *Umar Sultan* (4) establishes another exception to S. 86 so as to derogate from the section being construed as exhaustive in itself. *Secondly*, the alleged exception is not recognised by general International Law. It was contended before me that certain dicta in the case of *Duke of Brunswick* v. *The King of Honover* (5) show that sovereigns may be sued in their private capacity. But the actual decision in that case was that the Court had no jurisdiction, and I do not think that the cautious dicta on which reliance was placed can be of any assistance in view of the law as laid down in such cases as *Mighell* v. *Sultan of Johore* (2) and *Statham* v. *Statham & the Gaekwar of Baroda* (3). The point was expressly considered by Willis, J., in the *Sultan of Jahore's* case (2), where the effect of the *Duke of Brunswick's* case (5) is explained. For these reasons, I think that this petition must be dismissed.

The judgments in Civil Revision Petitions Nos. 511 and 512 of 1912 will follow. I do not wish to interfere with the order of the lower Court as to costs ; but here the petitioner in each case will pay one-third of the respondent's costs.

S.N./R.K.

Petition dismissed.

(5) (1848) 2 H. L. Cas. 1=9 Eng. Rep. 993.

A. I. R. 1916 Madras 310

SPENCER AND NAPIER, JJ.

Municipal Council of Kumbakonam—Defendant - Appellant.

v.

Veeraperumal Padayachi—Plaintiff—Respondent.

Second Appeal No. 1137 of 1913, decided on 22nd December 1914, from the decree of Sub-Judge, Kumbakonam, in Appeal No. 410 of 1912.

(a) Madras District Municipalities Act—(4 of 1884), S. 261—Notice under S. 261 is not necessary for suit for compensation by contractor for interference by Municipal servants, as S. 261 does not apply to compensation for breach of contracts.

S. 261 of the Madras District Municipalities Act (IV of 1884) does not apply to suits for compensation for breach of contract. [P. 313, C. 1.]

Therefore, as an interference by Municipal servants with a contractor to remove rubbish gives rise to a claim for compensation for breach of contract, a suit to recover such compensation need not be preceded by a notice prescribed by S. 261 of the Madras District Municipalities Act. 25 Bom. 387 ; *Garton* v. *G. W. Railway*, 120 E. R. 721 ; 22 Bom. 637 ; 2 Mad. 124 ; 31 Mad. 522 ; 6 Cal. 8 ; 16 Mad 296, Foll. ; 16 Mad. 317 ; 16 Mad. 474 ; 13 M.L.J. 426, dist. from ; 14 Mad. 386, ref. to. [P. 313, C. 2.]

(b) Civil P. C. (5 of 1908), O. 1, R. 10—Misjoinder or making wrong defendant can be cured by amendment.

Where the really contracting party, though at first made a defendant, is afterwards added as plaintiff, whatever defect there may originally be in the suit as at first instituted, it is cured by such subsequent amendment. [P. 313, C. 2.]

(c) Limitation Act (9 of 1908), S. 22 and Art. 2—S. 22 does not apply where defendant is made plaintiff—Limitation does not therefore begin on date he is made plaintiff—Art. 2 does not apply to suits on contract.

Article 2 of Schedule I of the Limitation Act does not apply to suits founded on contract. S. 22 of the Limitation Act, 1908, has no application to a case where a defendant is made a plaintiff, and the starting point of limitation as against him is not, therefore, the date on which he is so made a plaintiff. [P. 313, C. 2.]

(d) Hindu Law—Joint family—One co-parcener alone can sue for breach of contract entered into by him.

In a suit on a contract entered into by a member of a joint Hindu family the other members of the family are not necessary parties. [P. 314, C. 1.]

V. S. Govindachariar—for Appellant.

G. S. Ramachandriar—for Respondent.

Napier, J.—In this case the plaintiff brought a suit originally against the Municipality of Kumbakonam and another, a contractor, claiming to be interested in a contract made by his brother with the defendant Municipality, which contract was still in force, asking for an injunction against the defendants to restrain them from interfering with the work being done under the contract, and for a small amount of damages for extra expense to which the contractor had been put owing to past interference, the person with whom the contract was made not being joined as plaintiff but being made a defendant on the ground that he was at

the time in jail and unable to bring the suit himself. Subsequently, leave was granted by the District Munsif to amend the plaint and to make the contractor-defendant a plaintiff. This was done and a claim, alternative to that for an injunction, in the form of a claim for damages for Rs. 312-8-0 was added in the view that possibly the conditions had changed in such a manner that an injunction would not or could not be granted. The District Munsif decreed the amount against the Municipality and dismissed the suit against the other parties, holding that they were in no way responsible for the damage. The Municipality appealed on the ground that notice required by S. 261 had not been given and that the suit was barred by limitation on the merits. The subordinate Judge dismissed the appeal.

The points taken in this appeal are that no proper notice under S. 261 had been given, that the District Munsif erred in law in permitting the plaint to be amended, that the first plaintiff had no *locus standi* to file the suit and that the suit is barred by limitation.

On the question of notice, various points were raised which are only important if notice is necessary ; but, I am satisfied that S. 261 does not require notice in a suit of this nature. It provides that no action shall be brought against the Council or any Councillor or any servant or any person acting under the directions of the Council, Councillor or servant, on account of any act done or purporting to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act, until the expiration of one month after notice in writing has been delivered at the office of the Council or at the place of the abode of the Councillor or such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and other particulars. Sub-S. (2) provides that if such Council or person to whom notice has been given has before action commenced tendered sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered ; sub-S. (3) provides that except in the case of a suit for recovery of immoveable property or declaration of title thereto, the action shall be commenced within six-months after the accrual of the cause of action ; and sub-S. (4) provides that no action shall be brought against the Chairman on account of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged default on his part in the execution of this Act, if such act was done or if such default was made in good faith, but that such actions shall be brought against the Council.

The suit in this case was one for damages in respect of a contract entered into between the Municipal Council and the contractor for the removal of the rubbish. The act alleged to have been done was interference by the Council through its servants with the contractor, which interference prevented his collecting and disposing of at a profit the rubbish, the subject of the contract. The damages are estimated at the value of the manure which he was unable to collect and so dispose of. The contract is not of such a character as must necessarily arise out of the statutory powers given to a Municipal body although, of course, apart from the Act, the Municipality would have no existence and would, therefore, be unable to enter into such a contract.

The question now is, whether the interference by the Municipality giving rise to the breach is "done or purports to be done in pursuance or execution of this Act" or whether the action is brought in respect of "alleged neglect or default in the execution of this Act."

The words used are wide and it may be said are also vague, for, in one sense if a statutory body does any act or makes any contract it may be said that that act was done or contract made in execution of the act. But in my opinion this reading of the words is not what is contemplated by the Legislature. Some slight indication of the meaning may be gathered from sub-S. (2) which speaks of the Councillor or servant having tendered sufficient amends to the plaintiff. It would be a natural use of the word "amends" to apply it to any tortious act injuring a person or his property, such as for instance, trespass. But the word seems inapplicable to breaches of contract where the natural and legal phrase is compensation or damages. This point alone would not be

sufficient to decide the case, but there appears to be fairly uniform authority both in England and in India for exclusion of contracts of this nature from the purview of the section.

In *Ranchordas Moorarji* v *Municipal Commissisoners of the City of Bombay* (1), this point was considered and it was held as settled law that a suit on a specific contract was not within the section. Reference is made to the case of *Garton* v. *G. W. Railway* (2). The action was on a contract, the plaintiff suing for money had and received and on accounts settled. Earle, J., held that the notice given under the section was bad. In the Court of Exchequer Chamber the point was taken that no notice was required and it was held by the Court that an action for money had and received or upon accounts stated was not within the section which provided for notice for anything "done or omitted in pursuance of the Act or in execution of powers or authorities made, given or directed in, by or under the Act." It has to be noted that the section does not contain the words "in respect of any alleged neglect or default in the execution of the Act", but the words considered by the Court were "in pursuance of the Act or in execution of the powers under the Act", which words govern the additional words in S. 261 "alleged neglect or default." The ratio of the decision in *Ranchordas Moorarji* v. *Municipal Commissioners for the City of Bombay*(1) is stated by the Chief Justice as follows: "Conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act, and it is the breach of a specific contract that is the occasion of the right to sue."

Municipality of Faizpur v. *Manak Dulab Shet* (3) was a suit for specific performance of an alleged contract by the Municipality under which the plaintiff permitted the Municipality to pull down some constructions, they undertaking to rebuild them; there was a breach by the Municipality and damage was sought in addition to the suit for specific performance. It was held that S. 48 of the Bombay Municipal Act of 1884, which was in the same terms as S. 527 of the Bombay Municipal Act of 1888 considered by the Chief Justice, did not apply to suits for damages in respect of specific contracts.

Reliance is also placed on *Mayandi* v. *McQuhae* (4), a suit for money due on a timber contract. It was held that the suit was not within S. 168 of the Town Improvements Act of 1871; but that section is in much narrower words—a suit against the Commissioners, etc., for anything done under the Act—and it would hardly be safe to rely on the construction of such words as an authority for the construction of S. 261. The same objection applies to another case relied on, *Muthya Chettiar* v. *Secretary of State for India* (5). The Act considered there was the Salt Act IV of 1889, the words of S. 87 being "for anything done or ordered to be done under this Act." Two cases relied on by the appellant were *President of the Taluk Board of Sivaganga* v. *Narayanan* (6) and *Srinivasa* v. *Ratanasabapathi* (7). The first was a suit for an injunction restraining the *Taluq* Board from interfering with a wall built by the plaintiff. The Court held that a suit for declaration of title and for an injunction was not within the scope of the section, but used the following words: "the cases contemplated in that section are suits for compensation and for damages and the principle is to allow public bodies time for tender of amends to parties to avoid litigation." The words "compensation and damages" are certainly wide enough to cover suits for breach of contract, but they can be applied to the narrower limits laid down in the 25 Bombay case and certainly it did not decide that a suit will lie for breach of a specific contract. The case at page 474 was a suit to recover from a Municipality money deposited for the due performance of a contract. The Court decided without giving reasons that the suit was not within S. 261, quoting the words "the cases contemplated in that section are suits for compensation and damages." It has to be noted that this was a suit on a contract but for money had and received under the contract. It is, therefore, not an

1 (1901) 25 Bom 387.
(2) 120 E. R. 72; 27 L. J. Q. B. 375.
(3) (1898) 22 Bom. 637.
(4) (1878-80) 2 Mad. 214.
(5) (1908) 31 Mad. 522.
(6) (1893) 16 Mad. 317.
(7) (1893) 16 Mad. 474.

authority against the application of the section to a suit for damages for breach, but at the same time the words cannot be held necessarily applicable to such suits. These cases, therefore, are no authority for the appellant's proposition. The case of *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (8), quoted by the learned Judges, is one in which Garth, C. J., decided that "the section...is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise...of their statutory powers." These words can hardly include a suit for damages for breach of a contract.

The last case that is relied on is *Municipal Council of Kurnool* v. *Subanna Chetty* (9). In that case the point was taken in a petition under S. 25 of the Act IX of 1887, that a certain notice sent to the Council was defective, and the High Court was asked to set aside the decree obtained by the plaintiff. It does not appear from the report on what basis the loss or damage that was sustained was ascertained. But reference was made to the case of *Eales* v. *Municipal Commissioners of Madras* (10), which was a suit in tort. So far as it appears, therefore, this case is no authority in favour of the appellant. Even if the case was one on contract, the point was not decided as the Court declined to interfere in revision when the objection to the notice was then raised for the first time.

As against the inference sought to be made from the language of the Court in the above cases, there is the language used by this Court in *Syed Ameer Saheb* v. *Venkatarama* (11) where in construing S. 156 of the Local Boards Act of 1884, which is on similar terms to S. 261 under construction, the Court adopts the language of Garth, C. J., in *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (8) above referred to, that the section is only applicable to suits for compensation claimed for wrongful acts committed under colour of the Act. It can hardly be claimed that this language is applicable to suits for damages for breach of contract. On a careful consideration of the authorities I have come to the conclusion that there is no conflict between the view taken by this Court and that held in Bombay and on the words of the section and on the view taken in England on analogous words, I am satisfied that the decision in 25 Bombay is correct and should be followed by me. I, therefore, hold that no notice was necessary.

On the second point it is clear that under the rules of O. 6, the District Munsif had full power to allow the amendments. The point as to limitation is that the amendment of the plaint was made more than 90 days after the alleged breach by the defendants and that, therefore, the suit is barred by Article 2 of the Limitation Act, the language of which is "suit for compensation for doing an act alleged to be in pursuance of any enactment." The reasons above given for holding that this suit is not one for an act done in pursuance or execution of this Act or in respect of any alleged neglect or default in the execution of this act apply equally to the construction of this Article. It is, therefore, unnecessary to decide whether the date when the 3rd defendant became the 2nd plaintiff should be the starting point of limitation or the date on which the plaint was originally filed, but it would appear that S. 22 of the Limitation Act is conclusive on the point. The old Act which makes the date from which the limitation runs, where a new plaintiff is substituted or added, the date when he was so made a party, has been amended and the section has no application where a defendant is made a plaintiff, as has been done in this case.

The last question is whether the original plaintiff had any cause of action. Reliance is placed on *Iswaram Pillai* v. *Taregan* (12), where it was held that a stranger to the contract, although entitled to a benefit under it, is not entitled to sue. The lower Appellate Court has found that the first plaintiff was the undivided brother of the second plaintiff, the actual party to the contract and that he was the person who actually carried out the contract. He was as such entitled to bring the suit, provided that the actual contracting member of the family was made a party. This was done in the

(8) (1881) 6 Cal. 8.
(9) (1903) 13 M. L. J. 426.
(10) (1891) 14 Mad 386.
(11) (1893) 16 Mad. 296.

(12) A. I. R. 1914 Mad. 701=23 I. C. 951.

plaint as originally framed. After the 3rd defendant had become the 2nd plaintiff there was no necessity to join the other members of the family as the party in whose name the contract was made was entitled to bring the suit. This objection, therefore, fails. This second appeal is dismissed with costs.

Spencer, J.—I concur.

S. N. R. K.

Appeal dismissed.

A. I. R. 1916 Madras 314

Full Bench

WALLIS, C. J., AYLING AND SADASIVA AIYAR, JJ.

Jaldu Venkatasubba Rao—Plaintiff—Petitioner—Appellant.

v.

Asiatic Steam Navigation Co., Calcutta—Defendant—Respondent.

Letters Patent Appeal No. 250 of 1914, decided on 4th March, 1915, against the Judgment of Tyabji, J., dated 26th March, 1914, in Civil Revn. Petn. No. 568 of 1913, Reported in A. I. R. 1914 Mad. 57.

(a) Specific Relief Act (1 of 1877), S. 11—Suit against carrier for return of goods booked and not delivered and damages or its price and interest without allegation of possession of defendant is not one under S. 11 but for damages for non-delivery of goods.

Where in an action against a common carrier for non-delivery of a plank consigned to him for a carriage, the prayer in the plaint asked for plank and damages for its detention or in the alternative its value together with interest thereon and there was no allegation in the plaint that the defendant was in possession of the plank in question :

Held, that the suit could not be treated as one for the return of specific moveable property lost, under S. 11, but only as one for compensation for non-delivery of goods.]P. 317, C. 2.]

(b) Limitation Act (9 of 1908), Art. 31—Art. 31 governs suits for damages for non-delivery of goods.

Article 31 applies to a claim by a consignor against a carrier for compensation for non-delivery of goods consigned. [P 318, C. 2.]

(c) Specific Relief Act (1 of 1877), S. 11—Facts entitling delivery of specific moveables must be alleged and proved to obtain possession in manner provided by Civil P. C., O. 21, R. 31.

In order to entitle a person to obtain delivery of specific moveable property by suit and to enforce the decrees obtained by the stringent methods provided in O. 21, R. 31, Civil P. C., it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions of S. 11, Specific Relief Act. [P. 317, C. 2.]

(d) Limitation Act (9 of 1908), Art. 31—Article is applicable irrespectively whether suit is on contract or tort.

The effect of the amendment of Art. 31 of the Limitation Act, 1877, is to make it applicable to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. 3 Mad. 107 ; 2 Cal. 477 ; 19 Bom. 165, ref. to. [P. 318, C. 1 & 2.]

P. M. Srinivasa Ayyangar for *P. Nagabhushanam* for Appellant.

D. Chamier and *Pandalai* for *Partridge Hiquett* and *Sell*—for Respondent.

Order of Reference.

Spencer, J.—I have had the advantage of perusing the judgment which my learned brother is about to deliver, but I regret that I have not been able to come to the same conclusion at which he has arrived.

It is contended that the suit having been brought for the delivery of specific moveable property, *viz.*, a plank, or for its value, the plaintiff had three years within which to file his suit under Article 49 of the Limitation Act.

In support of this contention the decision in *Murugesa Mudali* v. *Jotharam Davy* (1) is cited.

That was a suit against purchasers at a Court auction to make them restore the goods purchased or their value as compensation.

The present is essentially a suit against a carrier for compensation for non-delivery of goods, and it has been held in *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Company* (2) and in *Great Indian Peninsula Railway Company* v. *Ganpat Rai* (3) that the Article applicable to such suits is Article 31, or if the carrier loses or injures the goods, then Article 30 [*Great Indian Peninsula Railway Company* v. *Raisett Chandmull* (4)], the period of limitation under either of these Articles in the present Limitation Act being one year.

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(1) (1899) 22 Mad. 478.
(2) (1902) 26 Bom. 562.
(3) (1911) 33 All. 544 ; 10 I. C. 122.
(4) (1895) 19 Bom. 165.

In *British India Steam Navigation Co.* v. *Hajee Mahomed Esack and Company* (5), it was thought that, while Article 30 would apply to suits for compensation for loss or damages to goods carried, Article 115 which allows three years' time for suing would apply to suits of breach of contracts to deliver, but that decision was prior to the enactment of Act X of 1899, S. 3 of which inserted the words 'non-delivery of or' in Article 31. It is not now argued before us that Article 115 applies. In *Danmull* v. *British India Steam Navigation Company* (6) which was also prior to Act X of 1899 the defendants denied that the plaintiff had entrusted them with the missing goods. It was the case of neither party that the goods had bean lost. *Mohan Singh Chawan* v. *Henry Conder* (7) was another case of non-delivery of goods prior to the enactment of 1899.

It may be that, when the words 'non-delivery of or' were inserted in this Article, the grouping of the Articles under the heads of suits upon contracts and suits upon torts was not heeded for convenience sake, seeing that non-delivery by a common carrier is first and foremost a tort as observed by Garth, C. J., in *Moothora Kant Shaw* v. *India General Steam Navigation Company* (8), though an action against a common carrier may be founded either on contract or on tort (*vide* Bullen and Leake on Pleading, 6th Edition, page 139. The division between suits on torts and suits on contracts is not strictly observed in the schedule, for Articles 48 and 49 include cases of tort, and they are after Article 36.

It seems to me that the Legislature intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands.

Now, the plaintiff cannot be allowed to extend the period of limitation by the dodge of demanding that the very goods themselves should be delivered to him, when the defendants have stated in a letter to him [see Exhibit A (1) that, owing to the long delay caused by the plaintiff in not producing the invoice in support of his bill, they find it difficult to check the shortage and have on that account pleaded non-liability to account to him. The mere allegation in the plaint that there was non-delivery implies a breach of the contract to carry, although the facts may disclose a tort also on the part of the carrier, but the date within which the plaintiff must file his suit will not depend on the defence set up in written statement. So plaintiff cannot run the risk of waiting till he knows what the defence will be, but must come to Court within the period allowed by the Legislature for claims based on non-delivery.

It was pointed out in *Murugesa Mudali* v. *Jotharam Davy* (1) the right to sue for the recovery of specific moveable property is governed by Ss. 10 and 11 of the Specific Relief Act, I of 1877, and that an injustice would be likely to result from giving a decree for the recovery of the goods *in specie*, as such a decree might be enforced by attachment of the judgment-debtor's property and the imprisonment of his person while it might be impossible for him to obey the decree without the assistance of the person in possession of the goods. The same remarks might be made as to carriers of goods who are unable to trace missing goods entrusted to them for delivery.

In the present case the only decree that the plaintiff could have obtained upon the pleadings, if he had sued in time, would have been a decree that the defendants should pay him compensation for non-delivery of the plank in question. Article 48 or 49 cannot be applied, since under column 3 of the Schedule time has not begun to run and thus there is no cause of action for a suit under either of these Articles.

I consider, therefore, that the learned Judge was right in holding that the suit fell under Article 31 of the Limitation Act and that this Letters Patent Appeal should be dismissed with costs.

Seshagiri Aiyar, J.—I have come to a different conclusion. The facts are these: 61 planks of teak wood were consigned at Moulmein in May 1909 through the defendant Company for delivery to the plaintiff at Masulipatam. The defend-

(5) (1881) 3 Mad. 107.
(6) (1886) 12 Cal. 477.
(7) (1883) 7 Bom. 478.
(8) (1884) 10 Cal. 166.

ants delivered only 60 planks on the 28th August 1909. This suit is brought on the 16th June 1912 for the recovery of the one plank of wood undelivered (the Court was closed from the 5th May to the 16th June.) The prayer in the plaint is in these terms :

(*a*) " directing the defendant to deliver to the plaintiff the plank worth Rs. 60-15-0, as per the copy of the bill filed herewith, as also Rs. 21-12-0 being the loss of interest,

(*b*) " or else directing the defendant to pay to the plaintiff Rs. 60-15-0, the value of the teak plank. Rs. 21-12-0 for interest, in all Rs. 82-11-0 together with subsequent interest. " The defendants pleaded the bar of limitation.

The District Munsif held that Article 31 of the Limitation Act applied and that as the suit was brought more than a year after the date on which the plank should have been delivered, he decided that the claim was barred by limitation. Mr. Justice Tyabji on revision agreed with this view. This Letters Patent Appeal is against that decision.

Article 31 is among a group of Articles dealing with compensation. The word compensation used in Article 17 and 18 has not the same meaning as in the subsequent Articles, but from Articles 19 to 31 the term is used to denote a claim for damages ; and in almost all the cases the cause of action is in tort. As was pointed out by Garth, C. J., in *Moothora Kant Shaw* v. *India General Steam Navigation Company* (8) the ordinary liability of a common carrier is founded on custom, and " a common carrier is and always has been liable to be sued for any breach of this common law duty *in an action of tort*. " This accounts for the inclusion of carriers in the category of cases relating to the award of compensation for torts. It was pointed out in *British India Steam Navigation Company* v. *Hajee Mahomed Esack and Company* (5) that the position of Article 31 suggests that it was intended to cover cases of malfeasence misfeasance and non-feasance independent of contract. Garth, C. J., in *Dammull* v. *British India Steam Navigation Company* (6), points out that the shorter period of limitation provided by the Article will not govern breaches of contract. Wilson, J., takes the same view. The fact that other cases relating to compensation from tortious acts are provided with a period of two years' limitation in subsequent Articles only shows that in the cases of carriers and in the special cases referred to till Article 31 is reached, the Legislature wanted the grievances to be earlier dealt with. I was at first inclined to think that cases of compensation for breaches of contract would come under Article 31. On further consideration I think that the correct view is to hold that in order to affect Article 31 the claim must be founded only on tort. Article 36 is the residuary Article in cases of torts. Article 49 provides for cases of compensation arising from a breach of contract ; and the residuary Article in regard to such matters is Article 115. Although it is not easy to give a logical explanation for the arrangement for the Articles in the Limitation Act, it seems clear from their grouping and from the position of the residuary Articles that compensation for torts is provided for separately from compensation for breaches of contract. I feel no hesitation, therefore, in holding that Article 31 does not relate to claims arising from contracts. It is true that the decisions to which I referred were passed before the Legislature amended Article 31 by inserting the words " or for non-delivery. " But this amendment cannot enlarge its scope. The essential characteristic of the original Article which must attach to it even after the amendment is that it deals with a claim for damages arising from a tortious act. A claim against a common carrier is not always restricted to damages. A carrier may have the consigned article in his possession and yet refuse to deliver it. Such an article may have some thing more than a commercial value to the consignee. In such cases he is entitled to ask for its delivery. Article 31 cannot cover such cases. The carrier in addition to the common law liability pointed out by Garth, C. J., may incur contractual obligations. See observations in *Moothora Kant Shaw* v. *India General Steam Navigation Company* (8). The enforceability of such obligations will depend on considerations different from those relating to the award of damages. Although a decree for delivery of specific moveable property may by virtue of O. 20, R. 10, provide for the payment of its value in the alternative, the decree-holder can

take steps for obtaining possession of the article itself. Mr. Chamier argued that as Article 31, is the only provision relating to carriers all cases against them are controlled by that Article. I am unable to agree with this contention. Suppose, for instance, an honest carrier intimates to the consignee a year after the date fixed for its delivery that he is unable to trace it; Article 31 can give no relief in such cases. It would leave the consignee without any remedy. There are special provisions relating to the recovery of articles *in specie*; and unless the language of these Articles exclude claims against carriers, I see no reason for not applying them to the case of carriers as well. I am, therefore, of opinion that to the claim as laid Article 31 does not apply. In *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Company* (2) the suit was "for Rs. 750 as damages for the non-delivery of 35 out of 200 cases of oil." In *Great Indian Peninsula Railway Company* v. *Ganpat Rai* (3) also the claim was for damages. There was no relief for the delivery of the specific article in these cases and although to the Allahabad case, the latter portion of Article 49 seems applicable, the point does not seem to have been argued. I do not think these cases are decisive of the point we have to decide in this case.

I think the claim falls under Article 49. The language of the first part exactly covers this case. The view taken in *Murugesa Mudali* v. *Jotharam Davy* (1) is in accordance with this conclusion. If Article 49 does not apply, Article 115 will apply.

In *Moothora Kant Shaw* v. *The Indian General Steam Navigation Company* (8), already referred to by me Garth, C. J., points out that "a carrier is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff" and he quotes Bullen and Leake in support of the position. In the forms of pleading given in that treatise, we have first of all statements of claims in contract; then come the statements of claims in tort-then follow forms for defence in actions of contract and afterwards similar forms for defence in actions in tort. These indicate that it is at the option of the consignee to sue in contract or in tort either for the specific article or for damages. In the present case the plaintiff has chosen to claim the article and he is entitled to choose that remedy.

By the Court.—Having regard to the importance of the question involved and to the difference of judicial opinion that exists, we think it is desirable that the question should be referred for the decision of a Full Bench upon the following points:

(1) "Whether Article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him or, in the alternative, their value and for interest upon the amount claimed as the value of the goods?"

(2) "Whether upon the pleadings, the suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods?"

Opinion.—Two questions have been referred to us; and it will be more convenient to deal with the second one first, "whether upon the pleadings this suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods." If we look at the prayer of the plaint, which asks for the return of the plank and also for Rs. 21-12 being the loss of interest, it may be treated as a suit both for the return of the specific plank and for damages for its detention. But in order to entitle the plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree so obtained by the stringent methods provided in O. 21, R. 31, of the Code of Civil Procedure, it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveble under the provisions of S. 11 of the Specific Relief Act, because unless he does so, he cannot have a decree for the return of the specific moveable property. There is no allegation in the plaint that the defendant is in possession of the plank in question and it is obvious from the correspondence that he is not. That being so, the case does not, in our opinion, come within clause (*a*) of S. 11 of the Specific Relief Act; and it certainly does not come within clauses (*b*), (*c*) or (*d*). In so far then as the suit can be

regarded as a suit for the return of the specific plank, the plaint discloses no cause of action, and the suit must be dismissed.

It may, however, as framed, be regarded as a suit for compensation for failure to deliver the plank in breach of the contract under the bill of lading. That brings us to the first question in the reference, "Whether Article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him, or in the alternative their value, and for interest upon the amount claimed as the value of the goods." As the Limitation Act of 1877 originally stood, there was a good deal of authority fo saying that Articles 30 and 31, which deal with suits against a carrier for compensation for losing or injuring goods and suits against a carrier for compensation for delay in delivering goods, did not apply. We need only refer to the decision of Sir Charles Turner, C. J., and another learned Judge in *British India Steam Navigation Co.* v. *Hajee Mahomed Esack & Co.* (5) and the other authorities cited in *Danmull* v. *British India Steam Navigation Co.* (6) and *Great Indian Peninsula Railway Co.* v. *Raisett Chandmull* (4). This view proceeded largely upon the position of these Articles among a number of other Articles dealing with suits for damages for torts, and in his judgment in *Great Indian Peninsula Railway Co.* v. *Raisett Chandmull* (4). Mr. Justice Farran (as he then was) expressed the opinion that this was a rather fallacious test and that in these rulings the Courts had not given effect to the intention of the Legislature, but stated, having regard to the current of decisions, it was rather for the Legislature to make its meaning more clear if it had been misinterpreted than for the Court to run counter to the decisions of the other High Courts. This was in the year 1894 and acting as we cannot doubt on this suggestion, the Legislature in 1899 amended Article 31 by inserting the words "non-delivery of or," so as to make the Article run: "against a carrier for compensation for non-delivery of, or delay in delivering goods." It seems to us that by this amendment the Legislature clearly indicated its intention that Article 31 should apply to a claim against a carrier for compensation for non-delivery of goods, irrespective of the question whether the suit was laid in contract or in tort. Even so it may be, as pointed out by one of the learned Judges who have referred the case, that Article 31 only deals with claims for compensation, and that Article 49 applies when in a proper case a claim is made against a carrier for the return of a specific moveable which, as already pointed out, is not this case. In so far, however, as Article 49 applies to suits "for compensation for wrongfully taking or injuring or wrongfully detaining the same," it is in any case inapplicable to the facts here, and even if it were applicable, its operation would be excluded by the provisions of the special Article 31 as amended, on the principle '*generalia specialibus non derogant*.'

Our answer to these questions is that the suit must be regarded as a suit for compensation and as such it comes under Article 31.

S.N./R.K

Reference answered.

A. I. R. 1916 Madras 318

SPENCER AND SESHAGIRI AIYAR, JJ.

Sivagnana Desika Gnanasambanda Pandarasannady—Petitioner.

v.

Advocate-General of Madras—Respondent.

Civil Revn. Petn. No. 889 of 1914, decided on 6th January 1915, against the Order of Sub-Judge, Mayavaram, in Interlocutory Appeal No. 304 of 1914.

(a) Civil P. C. (5 of 1908), S. 92 and O. 22, R. 2—In suit under S. 92 if trustee dies his successor-in-office can be brought on record especially when it is alleged that he had acted as agent of the last trustee and had contributed to mismanagement.

Where, during the pendency of a suit instituted by the Advocate-General against the trustee of certain *devestanams* for his removal on the ground of mis-management and breach of trust and for the settlement of a scheme and the appointment of a committee of supervision, the defendant died.

Held, that the cause of action survived against the successor-in-office of the deceased defendant and that he was rightly brought on record, inasmuch as the plaint contained averments to the effect that there had been systematic mismanagement of the funds of the trust, that there was no means of checking what was deposited in the *hundials*, that the servants of the temple

were making fortunes out of it, that there was a large surplus income every year which had to be properly employed and that the new defendant, the present trustee, had also contributed to the previous mismanagement in his character of agent of the deceased trustee facts which would by themselves be sufficient to found a suit for the framing of a scheme. [P. 320, C. 1.]

(b) Civil P. C. (5 of 1908), S. 92—(Per Seshagiri Aiyar., J.)—In determining whether settlement of scheme is principal or ancillary relief, fact that person who contributed to mismanagement has succeeded to office must be considered—When income is excess, framing of scheme would be proper remedy—For framing of scheme previous mismanagement with likelihood of future one is sufficient.

Per *Seshagiri Aiyar, J.*—In considering whether the prayer for the settlement of a scheme is only ancillary to the prayer for the removal of the trustee or is the principal relief claimed in the suit, the fact that the person who is said to have contributed to the prior mismanagements has succeeded to the trusteeship is a factor to be taken into account. [P. 319, C. 2.]

When the income of a temple is in excess of its expenditure, the Advocate-General will be well-advised in seeking the aid of the Court for the framing of a scheme for the proper application of the surplus. [P. 319, C. 2.]

In re Campden Charities, (1881) 18 Ch. D. 310, Foll.

The relief by way of settlement of a scheme need not depend upon charges against the trustee-in-office. It is sufficient if mismanagement is averred and it is alleged that a proper scheme is necessary to render the recurrence of the state of affairs impracticable. [P. 320, C. 1.]

T. Rangachariar and *Nallasivan Pillai*—for Petitioner.

M. O. Parthasarathi Iyengar and *S. Muthia Mudaliar*—for Respondent.

Spencer, J.—The suit was brought by the Advocate-General under S. 92 of the Code of Civil Procedure against the petitioner's predecessor-in-office and one of the reliefs asked for was the settlement of a scheme for the efficient management of the *devastanams* and the appointment of a committee of supervision as a check upon the trustee.

I am satisfied that in making the petitioner a party to the suit the lower Court committed no illegality or material irregularity and that there was no defective exercise of jurisdiction in its order so as to call for our interference in revision. It is further clear from paragraph 3 of the plaintiff's statement of 20th August 1911 and from paragraphs 8, 9, 13 (*g*), 15, 20 and 22 of the plaint that this suit was not brought solely on account of the personal mismanagement of the petitioner's predecessor.

The petition is dismissed with costs.

Seshagiri Aiyar, J.—I agree. Before dealing with the question raised by Mr. T. Rangachariar that the cause of action against the deceased trustee does not survive against his successor-in-office, it has to be noted that certain specific allegations of misfeasance and breach of trust are made in the plaint against the petitioner, while he was acting as agent of the deceased trustee in respect of the suit temple. It may be, as contended for by the learned Vakil, that the petitioner's conduct as agent should not be charged against him as trustee. At the same time, in considering whether the prayer for the settlement of a scheme is only ancillary to the one for the removal of the original defendant or was the principal relief claimed in the suit, the fact that the person who is said to have contributed to the prior mismanagement of the *devastanam* has now become the trustee, is a factor to be taken into account. Apart from this, I am satisfied that the cause of action as stated in the plaint does survive against the petitioner. In the earlier portion of the plaint there is a general allegation that the funds of the temple have been misappropriated. In paragraph 9, it is stated that since the assumption of trusteeship by the original defendant "the affairs of the *devastanam* have been drifting rapidly from bad to worse." This statement is intended to show that a general scheme is necessary to stop further malversation of the temple funds. Paragraph 12 says that the temple has a surplus of Rs. 26,000 annually. If the Advocate-General came to Court with this one allegation and asked for the settlement of a scheme for the utilisation of the surplus income, he will be within his rights under S. 92 of the Code of Civil Procedure. In *In re Campden Charaties* (1), the Court of Appeal pointed out that the fact that the surplus income was being applied in a particular manner was not a reason for not framing a proper scheme regarding its appropriation. The same rule must hold good in this country. When the income of a temple is in excess of its expenditure, the Advocate-General will be well advised in seeking the aid of the Court for a scheme for its proper employment. Consequently in so

(1) (1881) 18 Ch. D. 310 = 50 L. J. Ch. 646.

far as the allegation in paragraph 12 of the plaint is concerned, the relief for the settling of a scheme will survive against the successors of the original defendant. The statement in paragraph 13 (*g*) was supplemented by the plaintiff on the 20th August 1911. This is undoubtedly a part of the plaint In the subsequent statement, there is a distinct allegation that the specific instance is only "an illustration of the systematic mismanagement which calls for the settlement of the scheme." On this averment, it is impossible to argue that the cause of action does not survive against the petitioner. Paragraph 15 of the plaint is even stronger. It complains of the want of means "for checking what is deposited in the *hundials*." That can only be done in a properly framed scheme. In another place, the plaint charges that other servants of the temple "are also making fortunes out of the *devastanam*." This allegation is made with a view to the framing of a scheme. I have, therefore, no hesitation in holding that the cause of action at least in regard to the relief claimed in paragraph 25 (*e*) survives against the petitioner. The prayer for the removal of the original defendant must be struck out. I cannot accede to the contention of Mr. Rangachariar that the relief by way of setting a scheme must depend upon charges against the trustee-in-office. If the Advocate-General alleged that the affairs of the temple were mismanaged by a deceased trustee and that in order to render the recurrence of such a state of affairs impracticable it is necessary to have a proper scheme, he is entitled under the Code of Civil Procedure to seek the aid of the Court. That I take, in substance, is what he asks the Court to do by bringing the petitioner on record in place of the deceased trustee.

I am, therefore, of opinion that the order of the Subordinate Judge is right. The petition must be dismissed with costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1916 Madras 320

SADASIVA AIYAR AND TYABJI, JJ.

Paladugu Parasuramayya—Appellant.

v.

Valli Ramachandradu and *others*—Respondants.

Second Appeals Nos. 1548 and 1549 of 1911, decided on 17th July 1913, against the decrees of Tempy., Sub-Judge, Masulipatam, in Appeal Suit Nos. 480 and 522 of 1910.

(a) Limitation Act (15 of 1877), Art. 47—Suit for possession after six years of order under S. 145, Criminal P. C., is barred.

The plaintiff attempted to eject defendants from certain lands in their occupation alleging that they were let into them only for a year and that they were holding over. The Magistrate, at the instance of the defendants, instituted proceedings under S. 145 of the Criminal Procedure Code and passed an order in August 1903 declaring the defendants to be entitled to retain possession till ousted by the decree of a Civil Court. In December 1903, the plaintiff gave defendants a notice to quit. In 1909 the plaintiff instituted the present suit to recover possession :

Held, that the suit was barred by Article 47 of the Limitation Act. 9 I. C. 285, Foll. 28 Bom. dist; 18 Bom. 348; 7 I. A. 73; 19 Cal. 646, ref. to. [P. 321, C. 1 & 2.]

(b) Criminal P. C. (5 of 1898), S. 145—Order under S. 145 though illegal and irregular is not *ultra vires*.

A Magistrate's order under S. 145, Criminal Procedure Code, cannot be held to be *ultra vires* merely because he has acted illegally or irregularly. [P. 321, C. 1.]

(c) Limitation Act (15 of 1877), Art. 47 (Per Tyabji, J.,)—Art. 47 applies to suits based on title.

Per *Tyabji, J.*—Article 47 of the Limitation Act applies to suits based on title to ownership. [P. 322, C. 1.]

V. C. Seshachari—for Appellant.

V. Ramadoss—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant before us. He sued for recovery of possession of lands which had been let to the defendants in *Fasli* 1312 for that particular *Fasli*, and which the defendants had been holding over without the plaintiff's consent in the subsequent *fasli* before suit. There were proceedings instituted by the Magistrate at the instance of the defendants under S. 145 of the Criminal Procedure Code on account of the plaintiff's attempt to eject the defendants in the beginning of *Fasli* 1313. The Magistrate took a

statement from the plaintiff and then passed orders under S. 145 declaring the defendants to be entitled to retain possession till they were ousted by the decree of a Civil Court.

That order was passed in August 1903.

The present suit for possession was brought in March 1909, more than three years from the date of the Magistrate's order declaring the defendants to be entitled to retain possession and prohibiting the plaintiff from ejecting them till they were ousted by an order of a Civil Court.

The question is whether the suit is barred by Article 47 of the Limitation Act. The appellant's learned Vakil, Mr. Seshachariar, contends, *firstly*, that the order of the Magistrate under S. 145 of the Criminal Procedure Code was passed without jurisdiction and hence it is not a binding order and that Article 47 of the Limitation Act provides for limitation of three years from the date of the order of the Magistrate only if such order was a binding order passed with jurisdiction.

Secondly, he contends that the plaintiff had no right to possession as against the defendants during the pendency of the proceedings before the Magistrate, that he acquired such title only by virtue of a notice to quit, given by him in December 1903 and that, under such circumstances, Article 47 has no application.

As regards the first branch of the argument, I am not prepared to hold that the Magistrate acted without jurisdiction in passing the order of possession under S. 145. He might have acted illegally and irregularly in the exercise of his jurisdiction under S. 145. He might not have made the proper inquiries which he ought to have made before he passed the order but the record seems to show that the plaintiff had notice of the proceedings and though the notice may not have been served on him in accordance with law, he appeared and put in a statement before the Magistrate. I cannot hold, on the strength of a few general expressions in some of the Calcutta cases, that a Magistrate, who merely acts against law or irregularly under S. 145, also acts without jurisdiction in passing such an order under the section. I have perused the printed records in the case of *Gangadharam Aiyar* v. *Sankarappa Naidu* (1), out of which the decision reported there arose. In that case, also, there seem to have been illegalities and irregularities alleged against the order passed by the Magistrate, but the learned Judges held that the Magistrate could not be said to have acted without jurisdiction by reason of the illegality and irregularity he was alleged to have committed. They applied Article 47, (2nd Schedule), and S. 28 of the Limitation Act and held that the 2nd defendant's title in that case was barred by Article 47. I am unable to distinguish that case from the present

Mr. Seshachari also relied upon the case of *Tukaram* v. *Hari* (2). So far as I understand the decisions pronounced in that case, they seem to have proceeded upon the ground that all orders, made by a *Mamlatdar* under the Bombay Mamlatdars' Act, do not come within the meaning of the phrase "order respecting the possession of immoveable property" used in Article 47, that such orders passed by *Mamlatdars* under the Mamlatdars' Courts Act may be classified under three different heads and, that only orders coming under the first head, which positively declare or award possession to a particular party or prevent another party from disturbing the possession of one of the parties, could come within the meaning of the phrase in Article 47 above referred to; so far as orders under S. 145, Criminal Procedure Code, clause 6, are concerned, they are more analogous to the first class out of three classes of orders which can be passed by a *Mamlatdar* than to the other two classes of orders. The case of *Tukaram* v. *Hari* (2) does not dissent from the case of *Bapu* Bin *Mahadaji* v. *Mahadaji Vasudeo* (3), where it was held that Article 47 would apply where a *Mamlatdar* passed a positive order for possession.

As regards the 2nd branch of the appellant's contention, the allegations in the plaint and the proceedings before the Magistrate under S. 145 seem to show that the plaintiff did not treat the defendants as tenants holding over after the expiry of the prescribed term but treated them as trespassers after that date. If so, his right to possession as

(1) (1911) 9 I. C. 285.
(2) (1904) 28 Bom. 601.
(3) (1894) 18 Bom. 348.

against the defendants accrued on the 1st July 1903 before the Magisterial proceedings under S. 145 arose. The notice to quit possession against the defendants which was given in December 1903, did not, therefore, in any way create or perfect the plaintiff's title to possession as against the defendants, and the principle of the decision in *Bolai Chand Ghosal* v. *Samiruddin Mandal* (4) cannot, therefore, apply to this case.

In the result, the second appeal is dismissed with costs.

Tyabji, J.—I agree. The question for decision is whether the suit out of which the present appeal arises was barred by operation of Article 47 of the Limitation Act. It was argued before us that the proceedings under S. 145 of the Criminal Procedure Code must be considered as not having been taken at all because of their having been *ultra vires* (this is the expression employed in the memorandum of the appeal to the lower Court). I entirely agree with what my learned brother has said that there is nothing in support of the allegations on which this argument is founded and we must proceed, therefore, on the footing that the order under S. 145 of the Criminal Procedure Code is binding on the appellant.

The next point, which seems to me to be the only important point in the appeal, is whether Article 47 of the Limitation Act applies to a suit based on an alleged title to the ownership of the property or whether the application of that Article must be restricted to suits asking merely for possession of the property without basing the claim on any title to own it. It seems to me there is a good deal of substance in the argument that the Legislature cannot be taken to have cut down the period of limitation for the purpose of establishing title to immoveable property, which, as a general rule, is twelve years, unless there is something very definite to bring one to that conclusion. It must be admitted that the law is not as clearly laid down in the enactments as might be desirable and whatever decision we may come to, a certain amount of anomaly in the law must result. The difficulties may well be considered in connection with the decisions in *Tukaram* v. *Hari* (2) and *Wise* v. *Ameerunissa Khatoon*: *Wise* v. *Collector of Backergunge* (5).

In the former decision, a Full Bench of the Bombay High Court held that where the proceedings had consisted of an application to the Court under the Mamlatdars' Courts Act and had resulted in the *Mamlatdar* rejecting the plaint presented to him, the period of limitation was not governed either by Article 47 of the Limitation Act or S. 21 of the Mamlatdars' Courts Act. But, on an examination of the judgments in that case, it appears that the reasoning on which the decision was based was that the proceedings taken under the Mamlatdars' Courts Act in that case were not such as to bind any party with reference to the possession of the property in question: they resulted merely in that the *Mamlatdar* rejected the plaint. The Court, therefore, held that there was no order having reference to the title to the property within the terms of Article 47 of the Limitation Act inasmuch as it did not bind any person with respect to the possession of any immoveable property. On the other hand, in the case of orders under S. 145 of the Criminal Procedure Code, though the proceedings are in the first instance concerned with the preservation of peace and not with the title to the property, yet by reason of the 6th sub-section of S. 145 there is an order respecting the possession of the property binding the parties. So that in regard to this point, the proceedings under S. 145 of the Criminal Procedure Code are distinguishable from such proceedings under the Mamlatdars' Courts Act as had to be considered by the Full Bench in *Tukaram* v. *Hari* (2). The difficulty suggested by the other decision to which I have referred, namely, *Wise* v. *Ameerunnissa: Wise* v. *Collector of Backergunge* (5), is that the Privy Council lays down that the lapse of three years, which, in accordance with Article 47, is the period of limitation for instituting suits, does not suffice for founding a title by prescription, so that though one of the two claimants may be precluded from setting up any title to the land by reason of the lapse of the three years contemplated by Article 47, yet the opposing claimant is not entitled to rely upon

(4) (1902) 19 Cal. 646.

(5) (18779-80) 7 I. A. 73.

the lapse of the same period in order to base thereon his title to the ownership of the land. This, no doubt, creates an anomaly in the law. But it seems to me that anomaly is less flagrant than that which would be created if we were to hold that Article 47 refers merely to a possessory suit inasmuch as the law relating to the possessory suits, as laid down in the Specific Relief Act, S. 9, gives a period merely of six months for instituting a suit, and it would have to be held, were the appellant's contention before us accepted, that taking proceedings under the Criminal Procedure Code, S. 145, increases the period of limitation from six months to three years: but the policy of the law seems to be to shorten and not to enlarge the period of limitation when there have already been judicial proceedings between the parties with reference to the rights in question or to allied rights.

For these reasons, not without a certain amount of hesitation. I have come to the same conclusion as my learned brother, and agree that these appeals should be dismissed with costs.

S. N./R. K.

Appeals dismissed.

A. I. R. 1916 Madras 323

SADASIVA AIYAR AND NAPIER, JJ.

Penumeta Subbaraju —Defendant — Appellant.

v.

Veegesena Seetharamaraju and another—Plaintiffs—Respondents.

Second Appeal No. 1280 of 1913, decided on 5th November 1914, against the decree of Sub-Judge, Kistna, in Appeal Suit No. 225 of 1911.

(a) Execution sale—What passes—Auction purchaser in mortgage decree of crops even cannot disturb mortgagor's lessee—He is entitled to get rents reserved by mortgagor.

Where a lease of the mortgaged lands was made by the mortgagor for one year from July 1907 to July 1908 and the plaintiff purchased in Court auction in November 1907 in execution of a mortgage-decree not only the lands but also the crops standing thereon and the sale was confirmed in December 1907 and the crops harvested in January 1908.

Held, that a decree for sale, and the Court auction-sale held in pursuance thereof, will not effect the rights of the defendant lessee to the beneficial enjoyment of the crops, and that the purchase of the crops by the plaintiff in the Court auction did not give the plaintiff a title to the crops but only to what took the place of the right to the crops which would have vested in the mortgagor judgment-debtor if he had not parted with such right. [P. 323, C. 2 & P. 324, C. 2.]

A purchaser gets title not only to the property purchased but also to whatever has been lawfully substituted for the whole or part of the property sold to him. The larger right of the owner of a land to the profits and crops growing on that land includes the smaller right to the rent reserved to him in consideration of his having parted with the right to the crops themselves in favour of lessees.

[P. 324, C. 2 & P. 325, C. 1.]

(b) Transfer of Property Act (4 of 1882), S. 52—Mortgagor's yearly lease pending sale if reasonable incident of enjoyment is not affected by lis pendens.

Yearly leases and such other acts as are either necessary or the ordinary reasonable incidents of an *interim* beneficial enjoyment are not affected by Court auction-sale though they are made *pendente lite*.

(c) Transfer of Property Act (4 of 1882), Ss. 8 and 36—Scope of—S. 8 and 36 does not apply to involuntary sales.

Neither S. 8 nor S. 36 of the Transfer of Property Act applies to transfer of rights by execution sale. S. 36 of the Act about the daily accrual of rent applies only in the absence of a contract to the contrary. [P. 325, C. 1.]

(d) Transfer of Property Act (4 of 1882), Ss. 44 and 73—Scope of Ss. 44 and 73 stated—They lay down principles of substituted security.

Ss. 44 and 73 of Act IV of 1882 lay down the principle of the substitution of properties and securities in favour of persons who, through no fault of their own, are deprived of the original rights and securities. [P. 325, C. 2.]

P. Narayanamurthi—for Appellant.

B. N. Sarma—for Respondents.

Sadasiva Aiyar, J.—The 1st defendant is the appellant before us. He was the lessee under the defendants Nos. 7 and 8 for the year July 1907 to July 1908 of the plaint lands. The plaintiff purchased, in Court auction in November 1907 in execution of a mortgage-decree against the defendants Nos. 7 and 8 (passed so long ago in 1898 or 1899), the plaint lands. The plaintiff purchased not only the lands but also the crops standing thereon. The sale was confirmed in December 1907 under the old Civil Procedure Code. The crops were harvested in January 1908 by the 1st defendant. The rent reserved by the defendants Nos. 7 and 8 with the 1st defendant was 212 *bastas* of paddy, and its value is said in the lease-deed to be Rs. 1,272 at Rs. 6 per *basta* or bag. The 1st defendant paid Rs. 400 of the rent to the defendants No. 7 and 8 and carried away the crops in

January 1908. The plaintiffs brought the suit for recovery of Rs. 1,272 (the value of the grain rent due to the defendants Nos. 7 and 8 by the 1st defendant), on the allegation that by the plaintiff's purchase of the land and of the standing crops in November 1907 in Court auction, they (the plaintiffs) became entitled to the crops themselves or at least, they became entitled to recover the rents of Rs. 1,272, plaintiffs alleging further that the 1st defendant and the defendants Nos. 7 and 8 colluded together and cut and carried away the crops in January 1908 without paying even the rent of Rs. 1,272 to the plaintiffs. Plaintiffs also claim interest at Re. 1 per cent. per mensem from the 12th January 1908 till the date of suit (16th November 1908).

The lower Appellate Court held that the plaintiffs were entitled to at least the rent amounting to 212 bags of grain. It further held that though the lease-deed mentioned Rs. 6 per bag as the price, the real price was only Rs. 5 per bag and the price of the 212 bags was, therefore, Rs. 1,060 and not Rs. 1,272, as claimed in the plaint. It further found that as the defendants Nos. 7 and 8 had paid Rs. 400 to the 1st defendant who was not entitled to receive it, the 1st defendant must be deemed to have had and received it for the plaintiff. It, therefore, gave a decree against the defendants Nos. 7 and 8 for the Rs. 400 received by them out of the rent and it gave a decree for the remaining Rs. 660 out of the Rs. 1,060 against the defendants Nos. 1 to 6. It disallowed the plaintiffs' claim for interest, on the ground that the plaintiffs' suit was one for unliquidated damages and not for rent or liquidated damages. The contentions in appeal are:

(*a*) That the plaintiffs having purchased only the standing crops and the 1st defendant under his lease deed having become entitled to the crops as lessee, the plaintiffs purchased nothing. (I should add that this contention is not raised in any of the grounds of the memorandum of second appeal, but as a question of law it was allowed to be argued).

(*b*) That as the plaintiffs did not purchase the rights of the defendants Nos. 7 and 8 to the rent, they ought not to have been given a decree for the rent and their plaint ought not to have been allowed to be amended into a suit for the amount of the rent.

As regards the first contention, it raises the question whether when there has been a Court auction-sale in pursuance of a mortgage-decree, the mortgagor in possession could convey to a lessee the right to raise crops on the land and take them away so as to prevent the crops being validly sold in execution of the decree for sale already passed. In *Thakur Prasad* v. *Gaya Sahu* (1), it was held that "a lease of property made by a judgment-debtor against whom a mortgage-decree for sale had been made came within the purview of S. 52 of the Transfer of Property Act," and that the lessee cannot set up any rights under the lease as against the purchaser in the Court auction-sale held in execution of the mortgage-decree. I think, however, that the proposition is stated too broadly in that judgment, as it ignores the ordinary incident of the beneficial enjoyment which a mortgagor who is allowed to remain in possession is entitled to have the benefit of. In *Gajapati Radhikapatta Mahadevi Garu* v. *Gajapati Radhamani Mahadevi Garu* (2), the learned Judges Muthuswami Iyer and Hutchins, JJ., stated that "yearly leases and such other acts as are either the necessary or the ordinary reasonable incidents of an interim beneficial enjoyment will not be affected though they were made *pendente lite*." In this case, I think that the lease in 1st defendant's favour having been only for one year, the decree for sale and the Court auction-sale held in pursuance thereof will not affect the rights of the 1st defendant-lessee to the beneficial enjoyment of the crops. The purchase of the crops, therefore, by the plaintiff in the Court auction did not give the plaintiff a title to the crops themselves, but only to what took the place of the right to the crops which would have vested in the mortgagor-judgment-debtor if he had not parted with such right. We are unable to accept the contention of Mr. P. Narayanamurthi (Vakil for the appellant) that because the plaintiff did not purchase the rent which the mortgagor reserved to himself in the place of the right to cultivate and harvest the crops, which right he parted with to the lessee, therefore the plaintiff could not obtain the right even to the rent. A purchaser gets title not only to the property

(1) (1898) 20 All. 349.
(2) (1884) 7 Mad. 96.

purchased but also to whatever has been lawfully substituted for the whole or part of the property sold to him The larger right of the owner of a land to the profits and crops growing on that land includes the smaller right to the rent reserved by him in consideration of his having parted with the right to the crops themselves in favour of lessees. A sale of such larger right conveys a title to the smaller right which has taken the place of the larger right.

The sale in Court auction was made of the larger right to the standing crops as the Court had no notice that a smaller right to rent had been substituted by the judgment-debtor. The right to the rent was a legal incident attached to the right in the property. The entire interests of the mortgagor in the land together with all the legal incidents were intended to be, and were in fact, sold. The contention based on S. 8 of the Transfer of Property Act, namely, that the plaintiffs, in any case, are entitled only to the proportinate rent due after the confirmation of the sale (November 1907) till the end of the tenancy (July 1908) might be met by two answers. One answer is that neither S. 8 nor S. 36 of the Transfer of Property Act (the latter section providing that rent accrues from day to day) applies to transfer of rights by execution sale [see S. 2, clause (d), of the Act and *Satyendra Nath Thakur* v. *Nilkantha Singha* (3)]. The second answer is that we have to look to what has been substituted for the grain profits purchased by the plaintiffs, and not what rent he would have been entitled to if the mortgagors had, *by a private sale, sold the lands alone* on date of the confirmation of the sale. Further, S. 36 of Act IV of 1882 about the daily accrual of rent applies only "in the absence of a contract.....to the contrary." Here, Exhibit B clearly says that the whole rent shall be payable " on the Makarasankaranthi day," that is, the 10th January 1908 (and in default with interest from that date). When the contract shows that the whole rent accrues on that fixed date, it seems to be clearly a contract to the contrary of what is enacted in S. 36, and it has been so decided in *Satyendra Nath Thakur* v. *Nilkantha Singha* (3) by Norris and Banerjee, JJ.

I think, therefore, that though the plaintiffs may not be entitled to get the value of the crops themselves harvested and taken away by the lessees, owing rather to the equities in favour of the lessees than to the absence in the plaintiffs of a legal title to the crops, the plaintiffs are entitled to be substituted for the mortgagors in respect of the right to recover the whole rent due by the lessees. The substitution of properties and securities (in favour of a person who, through no fault of his own, is deprived of the original properties and securities) is well known to the law. This principle is embodied in Ss. 44 and 73 of Act IV of 1882 and is referred to and illustrated by Mr. Justice Krishnaswami Iyer in *Venkatarama Iyer* v. *Esumsa Rowthen* (4) As the lessees had paid only Rs. 400 of the rent to the mortgagors, the decree for the balance of Rs. 660 passed in the plaintiffs' favour against the lessees was rightly passed. I would, therefore, dismiss the appeal of the lessee, (the 1st defendant), in Second Appeal No. 1280 of 1913 with costs.

Napier, J.—I entirely agree.

S. N./R. K.

Appeal dismissed.

(3) (1894) 21 Cal. 383.

(4) (1910) 33 Mad. 429 ; 5 I. C. 92.

A. I. R. 1916 Madras 325

SADASIVA AIYAR, J.

Nagappa Thevan and *others*—Accused.

v.

Emperor—Opposite Party.

Civil Rev. Case No. 284 of 1913, Taken up No. 14 of 1913, decided on 3rd October 1913.

(a) Epidemic Diseases Act (3 of 1897), S. 3—Disobedience and not consequent result of it is to be proved by prosecution—Validity of order also must be proved though not challanged.

Under S. 3 of the Epidemic Diseases Act (III of 1897,) it is unnecessary for the prosecution to prove, in cases of disobedience of an order made under the Act, that the accused's disobedience was likely to cause danger. The only important question is whether the order was a lawful order under that Act. In case of offences under the Act where the accused pleads not guilty, it is not necessary for him to deny that such order was passed or to contest its legal

validity. It lies on the prosecution to prove these points. [P. 326, C. 1 & 2.]

(b) Epidemic Diseases Act (3 of 1897)—Delegation of authority when and to what extent allowed stated — Power to take measures is distinguished from regulations and orders to be observed by public—Order to vacate must be made by Government—Power to order evacuation cannot be delegated.

Under the Act, the Government itself can give power to an officer or officers to take measures but it cannot empower such officer or officers to delegate those powers to others unless such powers by their very nature can only be exercised through agents. The Collector has no power to delegate his own power and the Local Government has no right to empower a Collector to delegate the power which the Local Government confers upon him except in respect of performance of acts which by their very nature can be or are usually done through agents and such agents only.

The power, *to take measures*' under the Act, which may be granted to any person by the Local Government, is a different matter (though closely connected with the effective carrying on of the measures taken under the power), from the regulations or orders which have to be observed or obeyed by the public or a person or class of persons in respect of those measures.

A direction to the public to vacate their houses can only be made by a Regulation passed by the Government.

A power to call on the people to evacuate their houses given to a Collector cannot be delegated by him to a Divisional Officer.

(c) Epidemic Diseases Act (3 of 1897)—R. 104 is ***ultra vires.***

R. 104 of the Regulations under the Act is *ultra vires* of the Local Government.

M. *Govindarajulu Naidu*—for Accused.

C. Sidney Smith—for the Crown.

Judgment.—The accused, two in number, have been convicted under Ss. 188 and 269 of the Indian Penal Code. The question is whether they disobeyed any lawful order promulgated by a public servant so as to cause danger to public health etc., by their disobedience. The Epidemic Diseases Act III of 1897, S. 3, says that any person disobeying any regulation or order made under that Act shall be deemed to have committed an offence punishable under S. 188 of the Indian Penal Code. Owing to this statutory provision, it is unnecessary for the prosecution to prove, in cases of disobedience to an order made under Act III of 1897, that the accused's disobedience was likely to cause danger, etc. The contention of the accused's Counsel in this case that in the absence of such proof, the conviction under S. 188, could not be supported is, therefore, untenable.

The really important question is whether the disobeyed order was a lawful order made under Act III of 1897. The Act is a very short one of four sections, of which the second section is the longest and most important. Clause (1) of that section provides, (I quote only the portion relevant for this case), that the Governor-General-in-Council "may empower any person to take such measures" and that the Governor-General in Council may himself "prescribe such temporary regulations to be observed by the public or by any person or class of persons as he shall deem necessary to prevent the outbreak of" any dangerous epidemic disease "or the spread thereof."

By clause 3 of S. 2, the Governor-General in Council may direct that all his powers may be exercised by a Local Government, with respect to the Local Government's territories. The Madras Government has been invested with such powers, that is, the Madras Government can "take measures", can "empower any person to take measures" and can "prescribe regulations to be observed by the public or by any person or class of persons" to put down plague, etc.

In the present case, the order disobeyed was the order of the Sub-Collector of Pollachi Division to the public of Udamalpet to vacate their houses, etc. The order was not filed as an exhibit in the case and the duty of the prosecution to prove all the facts necessary to bring home the offence to the accused was not discharged in this case. Of course, if the accused pleaded "guilty," the Court could act upon it without evidence. But when the accused pleaded "not guilty", the fact that he did not deny the passing of the order or did not contest its legal validity cannot absolve the prosecution from its duty of proving the order and its legal validity. On this simple ground, the convictions are liable to be set aside.

I had the order of the Sub-Collector produced before me during the arguments in this petition case. I find that the Sub-Collector does not say that the Local Government empowered him to take any measures but it says that he made the evacuation order "under the powers

conferred by the Collector." The Collector can be empowered by the Local Government under the Act to "take measures," but the Collector cannot be empowered under the Act to himself give "powers to others." The regulations made under the Act by Government prescribe what acts should be observed by the public or by any person or class of persons and give powers to any person to take measures but such powers cannot be delegated by that person in its turn to others, *unless such delegation ought to be necessarily implied from the nature of the measures to be taken under the granted powers.* The Regulations made by the Local Government under the Act do not confine themselves to the Regulations "to be observed by the public etc." but also contain provisions empowering certain persons to take certain measures and even certain penal clauses which do not properly fall under regulations to be observed by the public, etc. The Act (S. 2, Cl. 1) keeps these two powers of Government distinct, namely, (1) the power "to empower any person to take measures" and (2) the power to make regulations for the conduct of the public etc.

Rule 71 of the Local Government's Regulations, clause (5), seems to empower a Plague Officer (the Sub-Collector in this case comes within the meaning of that term "Plague Officer") to direct the evacuation of a town when authorized by the Collector. The power "to take measures" may include the power to ask others to evacute their houses. A direction to the public to comply with that requisition falls, in my opinion, to be exercised under the power to make regulations to be observed by the public etc., that is, that direction should be made by the regulation passed by the Government.

In this case, the Sub-Collector did not get the authority of the Collector under R. 71 (5) to require the public of Udumalpet to evacuate their houses but seems to have acted under the powers delegated to him in 1904 by the general order of the then Collector of Coimbatore passed under R. 104 of the Regulations. R. 104 is as follows:—"The Collector may, from time to time, assign the Plague Officers and Assistant Plague Officers jurisdiction over such local area as confer on the latter officers such powers as he may deem fit." The Rule seems to be *ultra vires* of the Local Government. The Government itself can give powers under the Act to an officer or to officers to take measures but it cannot give powers under the Act to any person so as to enable the latter to himself give the said powers to others unless such powers by their very nature can be exercised only through agents. The Collector went even further in his order of 1904, in which he says that he "is pleased to delegate the powers detailed in the annexed Schedule" (including the power to order evacuation) "to all Plague Officers and Assistant Plague Officers" and not merely to appoint them as his sub-agents. The order does not say expressly that the officer to whom the Collector's powers are delegated should exercise them only within their jurisdiction as Revenue Officers or as public servants of any other department.)

The Collector had no power to delegate his own powers and the Local Government had no right to empower the Collector to delegate the powers which the Local Government gave to the Collector except in respect of performance of acts, which by their nature are or can be usually done only through agents and sub-agents. The Government can, by Regulations, empower any person "to take measures" for the suppression of plague and can prescribe *temporary* Regulations directing the public or any person or class of persons to *observe* such Regulations, that is the Local Government can itself order the public or any person or class of persons to evacuate their houses etc. Curiously enough, the Regulations do not directly require the public on the Collector's request to evacuate but this may be implied from the tenor of several rules. The phrase "to take measures" seems to mean the doing of disinfection work, the destruction of rats, and other similar measures (see S. 231 of the District Municipalities Act) and may include requisitions to be given to other persons to do certain acts such as evacuation but the direction to those other persons to obey the requisitions should be made by the Local Government under temporary Regulations. The Regulations to be observed by the public or a class of persons are to be *temporary* Regulations made by the Local Government. The Madras Regulations are not called "temporary." I think that they ought to show in the

beginning or the end up to what time, (say, till Government declares that the Madras Presidency to be free from plague), they are to be in force. In my opinion, the power " to take measures, " which power may be granted to any person by the Local Government, is a different thing, (though closely connected with the effective carrying out of the measeres taken under that power), from the Regulations or orders which have to be observed or obeyed by the public or a person or class of persons in respect of those measures. These latter orders to be obeyed by the public or a person or class of persons cannot, without great danger to the liberty of the subject, be left to be promulgated by any authority except the Local Government and hence the Act gave almost autocratic powers to the Local Government alone to issue temporary regulations or orders to be observed (that is obeyed) by the public or a person or class of persons, (orders to evacuate dwelling houses etc.), interfering very seriously with the rights of the public. The Collector, in this case, has delegated his right to take measures, *i.e.*, calling upon the people to evacuate houses, to his Divisional Officer whoever the latter officer may happen to be from and after 1904. This seems to me to be illegal. The Divisional Officer as a Plague Officer can under rule 71 (5) apply for authority to the Collector to ask people to evacuate and when so authorized, the power given by the Local Government to the Plague Officer by S. 71 to take measures will come into operation and give him the right to require evacuation of houses. But as I said already, the Sub-Collector did not get or apply for authority under R. 71 (5) in the case before he passed the order to the public to evacuate houses and he acted under the delegation under R. 104 by a former Collector of the Collector's own powers. That rule is *ultra vires*, and the delegation under that rule is of no legal effect to confer any powers on the Sub-Divisional Officer. It cannot surely be said that the power to order evacuation of houses is a power of such a character that from its nature it could be conveniently exercised only through appointing agents to exercise that power by delegation as each occasion arises without any further reference to the principal on any particular occasion (see the analogy of S. 190 of the Indian Contract Act).

As regards the conviction under S, 269, Indian Penal Code, there was no proof let in by the prosecution that the accused were guilty of any unlawful or negligent *act* likely to spread the infection of any disease etc. Taking it that " act " includes illegal omission (S. 32, Indian Penal Code), if the order of the Divisional Officers was illegal, the omission to comply with it is not an illegal omission.

I, therefore, set aside the convictions and sentences and direct the fine, if levied, to be refunded to the 2nd accused.

S. N./R. K.

Convictions set aside.

A. I. R. 1916 Madras 328

SADASIVA AIYAR AND HANNAY, JJ.

Thavasi and *others*—Defendants—Appellants.

v.

Arumugam and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 2007 to 2009 of 1913, decided on 2nd December 1914, against the decrees of Dist. Judge, Ramnad, in Appeal Suits Nos. 5 to 17 of 1910.

(a) Tort—Damages for wrongful retention of land should be profits which plaintiff would have naturally got if not kept out in beginning of cultivating year.

A plaintiff is entitled to recover the loss sustained by him through the defendant's tortious acts of having kept him out of possession of a certain land. The damage sustained in such a case is the profit which the plaintiff would have naturally got from the land if the land had not been wrongfully retained by the defendant in the beginning of the cultivation year.

[P. 330, C. 1.]

(b) Specific Relief Act (1 of 1877), S. 9—In suit under S. 9 claim for mesne profits cannot be joined and decided.

A claim for mesne profits ought not to be made in a suit for possession under S. 9, as the question of title cannot be directly decided in such a suit and, therefore, a relief which depends upon title, considered apart from possession, cannot be given in such a suit.

[P. 330, C. 2.]

(b) Civil P. C. (5 of 1908), S. 11, Expl. 5—Claim for mesne profits claimed in suit under S. 9, Specific Relief Act though not allowed is not barred—Civil P. C., O. 2, R. 2.

The words " relief claimed in the plaint " in Explanation V to S. 11 do not include a relief which, though claimed in the plaint,

cannot be granted as of right, assuming the defence fails. [P. 330, C. 2.

Therefore, a claim for mesne profits claimed in a former possessory suit but not allowed is not barred either by S. 11 or O. 2, R. 2. 24 All. 501; 25 Cal. 803 and 15 M. L. J. 462, Foll. [P. 331, C. 1.]

C. S. Venkatachariar—for Appellants.

K. V. Krishnaswami Iyer—for Respondents.

Judgment.—The contesting defendants are the appellants in this second appeal. The suit was brought for the recovery of the mesne profits due to the plaintiffs for *Faslis* 1314. 1315 and 1316, during which *Faslis* the defendants were in unlawful possession of the plaintiffs' land. The plaintiffs had brought a former suit (Original Suit No. 131 of 1905) under S. 9 of the Specific Relief Act in January 1905, very soon after they were forcibly dispossessed by the defendants. In that suit they prayed for possession of the lands with the crops then standing thereon. But if before the decree was passed for possession, the crops were removed by the defendants, the plaintiffs also prayed for recovery of the value of the crops from the defendants.

The District Munsif in that suit decreed only possession of the lands, evidently because the question of the plaintiffs' right to the value of the crops depended upon the plaintiffs' title to the land and in a suit under S. 9 of the Specific Relief Act, the question of title could not be finally decided and need not be gone into (See the judgment, Exhibit IV). The judgment in Original Suit No. 131 of 1905 was passed on the 31st March 1906. The plaintiffs executed that decree and got possession in November 1906, that is, about the middle of the *Fasli* 1316, after the season for ploughing, sowing and cultivation had expired, such season being in August-September 1906. If the defendants had given up the land before August 1906 to the plaintiffs, the plaintiffs could have begun cultivation in the due season of August 1906 and there would have been crops almost ripe for harvest in the middle of November 1906, when alone the plaintiffs were able to get possession through Court.

Such being the facts, several questions of law have been raised and decided in this case. The District Munsif held that because the defendants, after the 31st March 1906 (the date of the decree in the Original Suit No. 131 of 1905 for possession), did not cultivate the lands and left them waste, the plaintiffs were not entitled to mesne profits for *Fasli* 1316. He, therefore, decreed mesne profits only for *Faslis* 1314 and 1315. The learned District Judge thought that the learned District Munsif was wrong in his opinion that the plaintiffs had negligently delayed the execution of their possessory decree beyond August 1906. The District Judge, therefore, allowed the claim for mesne profits for *Fasli* 1316 which had been disallowed by the District Munsif; but the learned Judge disallowed the claim for mesne profits for *Fasli* 1314 (*i.e.*, mesne profits which the defendants wrongfully carried away in January 1905), on the ground that the plaintiffs having claimed such mesne profits in the former summary suit and not having been granted those mesne profits by the decree in that suit, the plaintiffs' claim was barred by *res judicata* under S. 11 of the Civil Procedure Code, read with its Explanation V. The decree passed by the learned District Judge contained an arithmetical error because, instead of allowing Rs. 160 (at Rs. 80 a year) for the two *Faslis* 1315 and 1316 as mesne profis, a sum of Rs. 390 was mentioned in the decree.

Out of the 11 grounds mentioned in the memorandum of second appeal, the only two arguable contentions are that the plaintiffs are not entitled to the mesne profits for *Fasli* 1316 and that the decree of the lower Appellate Court was not in accordance with the judgment, as it made the defendants liable for the mesne profits of the value of Rs. 390 instead of Rs. 160. The second contention based upon the clerical or arithmetical error is accepted as valid by the respondents' Vakil and it appears further that that error has been corrected by the lower Appellate Court itself pending this second appeal. As, however, there is a memorandum of objections by the plaintiffs contending that the lower Appellate Court's disallowance of the plaintiffs' claim for mesne profits for *Fasli* 1314 is erroneous and as the whole of the disputed matter is now before us, this Court will draw up a proper decree in accordance with the rights settled by our judgment in supersession of the lower Appellate Court's decree. The only

remaining contention so far as the second appeal is concerned is that relating to the mesne profits for *Fasli* 1316. Mr. C. S. Venkatachariar for the appellants argued that because the defendants did not cultivate the lands after the date of the decree in the former suit (31st March 1906) and left the lands waste, they were not bound to pay mesne profits for *Fasli* 1316, though the plaintiffs were unable to raise and obtain any profits in that *Fasli*. It is not alleged that the defendants gave notice to the plaintiffs to take possession of the lands as soon as the decree was passed against the defendants, or that the plaintiffs wilfully refused to take possession notwithstanding such notice. O. 20, R. 12, of the Civil Procedure Code, defines mesne profits as "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received." The defendants' wrongful possession continued till the plaintiffs were put in possession through Court, that is, till the middle of November 1906, and the defendants, if they had used ordinary diligence, could have cultivated the plaint lands in August 1906 and raised profits thereon. It was ingeniously argued that as on the date of the taking of possession by the plaintiffs, the crops would not have been quite ripe for harvest even if they had been raised, the defendants could not have *received* any profits and hence they were not liable for mesne profits for *Fasli* 1316. Of course, on a literal interpretation of the words in the definition of mesne profits, the argument is plausible enough; but in any event, the plaintiffs are entitled to recover the loss which they sustained by the defendants' tortious act in having kept the plaintiffs out of possession and whether compensation for such loss is called "profits" or "damages" they are entitled to be reimbursed that loss. Such damages are, naturally, the profits which the plaintiffs would have got from the lands if the lands had not been wrongfully retained by the defendants in the beginning of the cultivation season in *Fasli* 1316. This second appeal, therefore, fails, except as regards the clerical error already referred to and is dismissed with the respondents' proportionate costs on the sum of Rs. 160.

Coming to the memorandum of objections, the question to be considered is whether the lower Appellate Court was right in holding that the claim for mesne profits for *Fasli* 1314 was barred by *res judicata*. The true scope of a suit under S. 9 of the Specific Relief Act has been considered in the case of *Sheo Kumar* v. *Narain Das* (1) and *Tilak Chandra Dass* v. *Fatik Chandra Das* (2). In *Sheo Kumar* v. *Narain Das* (1) the following observations occur: "Under the Specific Relief Act, the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and, therefore, was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. *In a suit, however, for mesne profits, other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case, the Court could not award mesne profits as against the true owner.* Therefore we think that the defence under S. 43 of the Code of Civil Procedure fails." Thus it follows that a claim for mesne profits ought not to be made in a suit for possession under the Specific Relief Act, because the plaintiff who was forcibly dispossessed could not obtain a decree for mesne profits if the defendant who dispossessed him forcibly was the true owner of the lands; the question of title could not be directly decided in that suit and a relief which depends upon title (considered apart from possession) cannot be given in such a suit. In *Kuppusawmy Aiyar* v. *Venkataramier* (3) it was held by a Full Bench of the Court that the words "relief claimed in the plaint" in Explanation III to S. 13 of the old Civil Procedure Code (corresponding to Explanation V to S. 11 of the new Civil Procedure Code) did not include a relief which, though claimed in the plaint, the plaintiff was not entitled to as of right, assuming that the defence fails. Now in the former original suit, the defence did fail, but the plaintiff was not entitled as of right to the relief of the award of mesne profits which he claimed, because, as we said just now, the relief of the award of mesne profits depended upon a decision as to the plaintiffs' title, which the Court trying a suit under S. 9

(1) (1902) 24 All. 501.
(2) (1898) 25 Cal. 803.
(3) (1905) 15 M. L. J. 462.

of the Specific Relief Act was not bound to decide. We, therefore, hold that notwithstanding the wide words of Explanation V to S. 11, the plaintiffs are not barred by *res judicata* from claiming in the present suit based on title the relief as to mesne profits for *Fasli* 1314.

Mr. C. S. Venkatachariar further contended that even if the suit is not barred by *res judicata*, it is barred by O. 11, R. 2, of the new Civil Procedure Code (corresponding to old S. 43) and he relied upon the Privy Council decision in *Rangayya Goundan* v. *Nanjappa Rao* (4). There are at least two answers to this contention. In the first place, the plaintiff did not omit to sue in respect of, or intentionally relinquish in the former suit his claim for mesne profits for *Fasli* 1314 and hence O. 11, R. 2, does not in terms apply. In the second place, even if he had so omitted to sue, the case in *Sheo Kumar* v. *Narain Das* (1) clearly shows that the cause of action for mesne profits in an ordinary suit being different from the cause of action in the former summary suit, O. 11, R. 2, corresponding to S. 43 of the old Civil Procedure Code, has no application. We might further add that O. 11, R. 2, directs only that the whole claim in respect of the same *cause of action* should be included in one and the same suit and it had been recently held by a Full Bench of this Court that the cause of action *even for past mesne profits* is a different cause of action from the cause of action in the suit in ejectment [see *Ponnammal* v. *Ramamirta Aiyar* (5)]. We, therefore, allow the memorandum of objections with costs throughout on the amount awrded. In the result, a decree will be drawn up in the suit awarding Rs. 240 as the mesne profits due to the plaintiffs for the three *Faslis* 1314 to 1316. For similar reasons, similar decrees will be drawn up in the connected suits out of which connected Second Appeals Nos. 2008 and 2009 of 1913 have arisen.

S. N./R. K.

Appeal dismissed.
Memorandum of objections allowed.

(4) (1901) 24 Mad. 491=28 I. A. 221 (P. C.)
(5) (1915) 27 I. C. 679.

A. I. R. 1916 Madras 331

WALLIS, C. J. AND SRINIVASA AIYANGAR, J.

Tirumalai Tirupati Kovil Kandadai Appan Sriranga Chariar and *another*—Plaintiffs—Appellants.

v.

Tirumalai Tirupati Kovil Kandadai Appan Pranatharthihara Chariar and *others*—Defendants—Respondents.

First Appeal No. 159 of 1913, decided on 21st July, 1915, from the decree of Sub-Judge, North Arcot, in Original Suit No. 2 of 1912.

Civil P. C. (5 of 1908), S. 92—S. 92 is not applicable to suit in respect of *inam* grant for service of Acharyapurusha exclusively.

No suit lies under S. 92 of the Code of Civil Procedure to administer an *inam* granted to certain persons for the performance of the service of Acharyapurusha in a temple when no part of the *inam* was applicable to the temple but the whole of it was intended to benefit the grantees alone. [P. 332, C. 1.]

T. Rangachariar and *N. S. Rangaswamy Aiyangar*—for Appellants.

A. Ramachandrier, *T. V. Muthukrishna Aiyar* and *T. M. Krishnaswamy Aiyar*—for Respondents.

Judgment.—This is a suit instituted by the plaintiffs under S. 92 of the Code of Civil Procedure against defendants Nos. 1 to 4, in whose family the office of Acharyapurusha in the Tirumalai Tirupati temples is hereditary, and against their alienees, and prays for the removal of the defendants Nos. 1 to 4 from the office of trustees of the suit properties, for the appointment of new trustees, a declaration that the alienations of the suit properties by the defendants are void, and an order vesting them in the new trustees. The suit properties are *inams* confirmed to the defendants' family at the time of the *Inam* Settlement, and the original grant appears to have included the land itself as well as the revenue thereon. The *inam* registers state that they had been granted for service as Acharyapurusha in the Tirumalai Tirupati Devastanam so long as the service should be rendered, and the title-deed, Exhibit B, acknowledges the title of the grantee to a *devadayam* or *pagoda* service *inam* "for the support of the *pagoda* called service of Acharyapurusha in the said temple." The words "the support of the

pagoda called," which do not make very good sense, were probably part of the common form drawn up for the confirmation of *devadayam inam* and do not add anything to the nature of the grant which, as also appears from the register, was for the service called Acharyapurusha in the said temple and was confirmed so long as the conditions thereof should be duly performed. The defendants denied that the lands so granted are held by them as trustees and contended that the suit was not maintainable under S. 92 of the Code of Civil Procedure. The Subordinate Judge held that the grant was for the benefit of the grantees though possibly burdened with certain trusts to a slight extent, and dismissed the suit apparently on the ground that no sufficient case of breach of trust was made out. It was the practice of former rulers to provide for the support of temple officers by grants of this kind and great numbers of such grants exist not only in connection with this temple, as to which see Exhibit M, but also in connection with other temples throughout the country. Such *inams* are liable to be resumed under the conditions of the grant if the services provided for are not duly rendered ; but it has never yet been suggested that the lands so granted are held by the grantees on trust for the temple which can be administered by the Court, or form the subject of a suit under S. 92 of the Code of Civil Procedure.

According to the definition of a trust in the Trusts Act, which is equally applicable to a charitable trust unaffected by that Act, a trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owners for the benefit of another or of another and the owner. The main object of the grant in this case would appear to have been the support of the temple officer discharging the duty of Acharyapurusha in the Tirumalai temple and the *inam* title-deed does not state that any portion of the *inam* was applicable to the temple. We agree with the Subordinate Judge that the plaintiffs have failed to show that the grant was given, among other things, for the performance of festivals in the Nadamuni temple below the hill at Tirupati and that the property was held on trust for that temple as well as for the grantee named. We also think the plaintiffs have failed to show that the property was held on trust for the grantee named and the Tirumalai temple. The fact that, as found by the Subordinate Judge, it is the practice of the defendants to expend small sums on the performance of festivals in the Tirumalai temple itself is not enough, in our opinion, to show that the original grant was made to the grantee for the benefit of the temple as well as the grantee. Reference was made to the provisions in Madras Act VIII of 1869 that nothing in the *inam* title-deed shall be deemed to affect rights of holders or occupiers of lands from which any *inam* is derived or to affect the interests of any person other than the *inam*-holder named in the title-deed, and if it could be shown that under the original grant either of these temples had a beneficial interest in the land itself or even in the revenue thereon, that interest would not be affected by a title-deed issued to a third party in which they were not named, but that is not the case here. In the result, we think that in the circumstances the suit which was filed under S. 92 of the Code of Civil Procedure fails and that the Subordinate Judge was right in dismissing it. The appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 332

MILLER AND SADASIVA AIYAR, JJ.

Muthusamier and *others*—Defendants—Appellants.

v.

Sree Sree Methanithi Swamiyar Avergal and *others*—Plaintiffs—Respondents.

Appeal Suits Nos. 185 and 186 of 1908, decided on 5th March, 1913, against the decree of Tempy., Sub-Judge, Madura, in O. S. No. 16 of 1908.

(a) Hindu Law—Religious endowment—Mutt—Power of matadhipathi—Matadhipathi has an absolute right to dispose of the income subject to upkeep of mutt—Alienation beyond powers by Matadhipathi is not void—His position in some respects is of tenant for life—He cannot make an alienation beyond his lifetime—Revenue sale in default of payment of revenue passes owner's interest—Revenue sale without notice is irregular but suit to set aside is barred by Madras Revenue Recovery Act (2 of 1864), S. 59—(Per Sadasiva Aiyar, J.)—Position of Matadhipathi is

that of Hindu widow—Suit by him for setting aside alienation and possession is governed by Limitation Act (9 of 1908), Art. 144.

The *inam* in suit was leased out in 1872 to a *Brahmin*, Mudgula Chariar, by the then Matadhipathi. The lessee assigned his interest to the 1st and 2nd defendants and to predecessors of 12th and 13th defendants. The lessor died in 1890 and was succeeded by another Swamiar, who acting on behalf of the original lessor in 1889, leased the *inam* to 6th defendant, cancelling the lease of 1872. But as the 6th defendant could never obtain possession, the Swamiar treated the occupants under the old lease as tenants and collected rents from them. A portion of the land was also sold in auction to the 5th defendant by the Revenue Authorities for default of payment of local cesses.

In 1906, the plaintiff succeeded to the office as Swamiar and sued to set aside the lease of 1872 and recover possession of the *inam*:

Held, that the right of the Matadhipathi to the properties of the *Mutt* is an absolute right to dispose of the income, subject to the upkeep of the *Mutt*. [P. 334, C. 2.]

Vidyapurna Tirtha Swami v. *Vidyanidhi Thirthaswami*, 27 Mad. 435, ref. to; 33 Mad. 265 (F. B.), Foll.

Though the lease of 1872 was beyond the powers of the lessor, he could not have avoided it during his own life-time. An alienation by the head of a religious foundation is not necessarily utterly void and of no effect. 36 Cal. 1003 (P. C.), 27 Mad. 435, rel. on. 16 I. C. 53; 33 Cal. 511, ref. to. [P. 335, C. 2.]

Though a Matadhipathi is in a certain sense an owner in fee simple yet in many respects he has only the powers of a tenant for life. His position is similar to that of a corporation sole in England. 27 Mad. 435; *Knight* v. *Mosely*, Ambler 176, *Mulliner* v. *Midland Ry. Co.*, 11 Ch. D. 611, ref. to. [P. 336, C. 1.]

His position is not, in fact, that of a tenant for life. 33 Mad. 265; (F. B.), ref. to. [P. 335, C. 2.]

A Matadhipathi cannot make nor validate a transfer beyond his tenure of office. As the 5th defendant never paid any rent to the *Mutt*, after the revenue sale to him it must be deemed that the owner's interest is sold by the Revenue Authorities. Since the sale took place without notice to the *Mutt*, it was irregular and liable to be set aside. But such a suit was barred whether under S. 59 of Act II of 1864 or Article 12 of the second Schedure to the Limitation Act. [P. 336, C. 2. & P. 337, C. 1.]

Per *Sadasiva Aiyar, J.*—The position of a Matadhipathi is in many ways analogous to that of the estate of a Hindu female heir to a male's estate. Therefore he can contest an alienation and sue for possession within 12 years of his becoming Matadhipathi. 34 Cal. 329 (P. C.) ref. to. [P. 337, C. 1.]

(b) Civil P. C. (5 of 1908), S. 92—S. 92 applies to *Mutt* and misuse can be prevented.

S. 92 (1) of the Civil Procedure Code is to be applied to *Mutts* and the public, the Advocate-General and the Courts of Justice should have the power to stop the wholesale misuse of the income of a charitable religious institution like a *matam*. 16 I.C. 53; 16 I. C. 622, ref. to. [P. 337, C. 2.]

(c) Madras Local Boards Act (5 of 1884), Ss. 66, 73 and 76—*Inamdar* is liable for road-cess and not a tenant—Procedure of sale under this act is similar to Madras Revenue Recovery Act, (2 of 1864)—But Ss. 32 and 42 of (2 of 1864) do not apply.

It is clear from S. 3 (10), S. 64 (2) and Ss. 66 and 73 of the Local Boards Act (V of 1884) that it is the *inamdar* (*matam*) who is liable for the road-cess and not any tenant of the *matam*. The procedure laid down for sales under this Act is the same as that under the Revenue Recovery Act, in virtue of S. 76 of the Local Boards Act. [P. 337, C. 2 & P. 338, C. 1.]

But the substantive provisions of the Revenue Recovery Act (Ss. 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act. 7 Mad. 434; 25 Mad. 572, rel. on. [P. 338, C. 1.]

(d) Limitation Act (9 of 1908), Arts. 12, 134 and 144—Irregularities of revenue sale do not help to set aside sale after period of limitation.

The irregularities complained of cannot be made the basis for attacking the sale after the time fixed by law for the setting aside of such a sale had expired. 25 Bom. 337; (P. C.), ref. to. [P. 338, C. 2.]

R. Kuppuswami Aiyar, K. V. Krishnaswamy Aiyar, S. Srinivasa Aiyangar and *C. V. Ananthakrishna Aiyar*—for Appellants.

T. Subrahmania Aiyar and *K. Srinivasa Aiyangar*—for Respondents.

Miller, J.—In 1872 the Matadhipathi Sukgnana Nidhi Swamiar made an alienation of the *inam* in dispute by way of a lease in perpetuity to a *Brahmin*, Mudgala Chariar, who enjoyed it till 1884 and then sub-leased or assigned his interest to the 1st and 2nd defendants and to predecessors of the 12th and 13th defendants.

The lessor died in 1890 and was succeeded by Sri Suthi Nidhi Swamiar, a person who had been managing the affairs of the *Mutt* on behalf of his predecessor during the later years of his life. In 1889, before his predecessor's death, he, on behalf of the Matadhipathi, leased the *inam* to the 6th defendant, cancelling the lease of 1872. The 6th defendant was, however, never able to obtain possession, and from 1893 onwards at any rate, the Swamiar was collecting the rent reserved by the old lease of 1872, from the persons then occupying as transferees of the lessee, and in 1903 the litigation about the 6th defendant's lease having come to an end, he treated the

occupants under the old lease as the tenants and recovered rent from them apportioned according to the shares held by them in the *inam*.

In 1906 Sri Sudhi Nidhi Swamiar died and was succeeded by the plaintiff who sues to set aside the lease and recover possession of the *inam*.

The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the Matadhipathi, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890.

The respondents do not contend for the view taken by the Subordinate Judge, that each Matadhipathi has what I may call an independent life-estate in the *Mutt*, and is in no way bound by any prescription by which his predecessor may have lost his title.

As this view is not now supported, it is sufficient to say that it is not justified by the judgment of Bhashyam Iyengar, J., in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirthaswami* (1) on which the Subordinate Judge seems to base it.

The Subordinate Judge, however, also holds that at any rate the lease was good for the life-time of Sukgnana Nidhi Swamiar, and was adopted by his successor and allowed to run on, and this view is that which is now pressed upon us.

We are bound by the decision of the Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran* (2), the effect of which is, as I understand it, to accept generally the view of a Matadhipathi's position taken by the learned Judges in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirthaswami* (1).

In that case Bhashyam Iyengar, J., holds that the *corpus* of the *Mutt* property is inalienable except in special circumstances, but that the produce, subject to the upkeep of the *Mutt*, is at the absolute disposal of the Matadhipathi, and he recognises what is further emphasised by the Full Bench, that there may be properties vested in the Matadhipathi as a bare trustee.

I may, therefore, here state my opinion on the evidence that the *inam* in question now is not so vested in the plaintiff; the *inam* registers show that it was granted for the support of the *Mutt* and the oral evidence is not inconsistent with that. The register shows further that at the time of the *inam* settlement the produce was used for certain purposes and was not of itself sufficient for the upkeep of the *Mutt*, but that is not sufficient to warrant us in holding that the grant was for those specific purposes. The statement as to the purposes to which the income was then being applied was obviously made as showing that the *inam* might properly be confirmed for the support of the *Mutt*. I take it, therefore, that the *inam* is one in which the Matadhipathi has, subject to the upkeep of the *Mutt*, that which is called, in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1), an absolute right to dispose of the income. It may still be open to us in this Court to hold that even this right is not altogether an absolute right, but that is a question which it is not necessary to decide in this case.

There is nothing in this case to suggest that the lease in question operated to the detriment of the upkeep of the *Mutt*. If it did so operate, if it reduced the income below what is necessary for the upkeep of the *Mutt*, it is possible that it might be held to be absolutely void *ab initio*; that may be a difficult question, but fortunately it does not arise. Before us no one has suggested that as a fact the *Mutt* was not adequately maintained by Sukgnana Nidhi Swamiar or by his successor.

Now, if the Matadhipathi has the management of the land and an absolute right to dispose of the income thereof, it seems difficult to withhold from him the right to make for his own life or rather for the period during which he occupies the position of head of the *Mutt*, a lease of a portion of the property for any rent however small which he may deem sufficient; he may, subject to the reservation of a sufficient fund for the upkeep of the *Mutt*, make gifts of the rents received to any one whom he chooses to favour.

It is unnecessary to decide whether there exist any means of preventing him

(1) (1904) 27 Mad. 435.
(2) (1910) 33 Mad. 265; 5 I. C. 4 (F. B.)

from so dealing with the surplus income as to create a scandal and bring the *Mutt* into disrepute: here all that has been done is to give land on a favourable rent to one who, we may presume was a sufficiently pious Brahmin.

It is suggested that to allow transfers by way of lease to be made by successive Matadhipathis, each for the period of his headship of the *Mutt*, would be destructive of the institutious of which they are the heads: all the property, it is argued, even the *Mutt* buildings, might be alienated to a Christian, a Muhammadan or an outcaste. It is probable, however, that inasmuch as the upkeep of the *Mutt* is the first consideration and the Matadhipathis' interest is subject to that consideration, the law, if any one is entitled to put it in motion, would be able to prevent the transfer of the *Mutt* buildings to any person incapable of continuing or unwilling to continue, to maintain the institution in accordance with the objects and views of its founder and the conditions laid down by him or imposed by usage. And it seems quite immaterial whether the lands are cultivated by a Christian or Muhammadan farmer, provided he is a good husbandman and pays his rent with regularity.

In *Abhiram Goswami* v. *Shyama Charan Nandi* (3) the Privy Council, as I understand the case, adopted what their Lordships call the 'most favourable construction' (of the powers of the alienor I presume) and were of opinion that the alienation was good for the life of the alienor; and his immediate successor being insane, prescription would not run against him; and Article 134 being inapplicable, the plaintiff was not barred.

Their Lordships do not, it is true, expressly state the case in this way, but I find it impossible to accept the contention on behalf of the appellants that they may have confined their attention to Article 134 of the second Schedule of the Limitation Act (XV of 1877), and have overlooked the possibility of the extinction of the plaintiff's title by reason of Article 144. The report of the argument both in *Shyama Charan Nandy* v. *Abhiram Goswami* (4) and in *Abhiram Goswami* v. *Shyama Charan Nandi* (3) indicates that that is very unlikely, and I agree with the learned Judges who in *Narsaya Udpa* v. *Venkataramana Bhatta* (5) expressed the opinion that their Lordships proceeded on the view that the alienation was good for the life-time of the alienor. *Abhiram Goswami* v. *Shyama Charan Nandi* (3) is, therefore, an authority that an alienation by the head of a religious foundation is not necessarily utterly void and of no effect. In reliance upon this authority and on *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1). I am prepared to hold in the present case that the lease of 1872, though beyond the powers of the lessor, was a lease which he could not have avoided during his own life-time.

And I think we may deduce from *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) the further rule that the lease is voidable by the lessor's successors, in very much the same way that an alienation by a Hindu widow in excess of her powers is voidable by her successors. Both the learned Judges in *Vidyapurna Tirtha Swami* v, *Vidyanidhi Thirthaswami* (1) hold that a Matadhipathi has an estate very closely resembling that of certain ecclesiastical corporations sole in England. Bhashyam Iyengar, J., at page 457 holds that he is "as much a corporation sole as a Bishop admittedly is" and at page 456 cites the decision of Lord Hardwicke in *Knight* v. *Mosely* (6) and of Sir George Jessel in *Mulliner* v. *Midland Ruilway Company* (7) as showing that the nature of the estate vested in certain corporations sole is "the fee simple qualified and under restrictions in right of the Church."

Subramania Aiyar, J., too, takes the same view; the Swamiar for the time being is "a real owner and not a mere trustee. He is, as he would be described in England, a corporation sole" (page 442).

Consequently it seems to me that when the learned Judges speak of 'an estate for life in the corpus,' and of the individuals composing the line of succession as being 'in the position of tenants for life,' they do not mean that the estate is in fact that of a tenant for life (Sankaran Nair, J., in *Kailasam Pillai* v. *Nataraja Thambi-*

(3) (1909) 36 Cal. 1003=4 I. C. 449=36 I. A. 148 (P. C.)
(4) (1906) 33 Cal. 511.
(5) (1912) 16 I C. 53.
(6) Ambler 176=27 Eng. Rep. 118.
(7) (1879) 11 Ch. D. 611.

ran (2) expressly says it is not, but rather what Sir George Jessel pointed out in the case to which Bhashyam Iyengar, J., refers " though in a certain sense owners in fee simple yet in many respects they (certain corporation sole) had only the powers of tenants for life."

Being "owners of an inheritance," Matadhipathis could, but for 'restrictions and qualifications in right of' their *Mutts*, make leases so as to bind their successors; in this country we have no statute which declares alienation by the head of a *Mutt* to be 'utterly void and of no effect' and we are not bound to hold that the restrictions and qualifications which attach to the estate are, as regards their effect, different from those which prevent a Hindu widow from binding her successors by unjustifiable alienations by way of lease. There are, no doubt, differences in respect of the purposes which will justify an alienation, but there seems to be no reason to hold that the differences extend also to the duration of the lease as a valid transfer. Of course, the successor of a Matadhipathi will be unable to validate it for all time. In that respect he will be like a female succeeding to a widow, say a daughter succeeding her mother as her father's heir; he will be able to validate the transfer only for the period during which he holds the office, and will be unable to bind his successor, but he will be able to avoid the lease altogether or affirm it for this period, and it will not be absolutely nullified by the death of the alienor.

This being my view of the position, I have to consider the question whether the plaintiff's immediate predecessor, Sir Sudhi Nidhi Swamiar, adopted the lease and ratified it so far as he could ratify it. In 1889, before he became Matadhipathi, and purporting to act for his predecessor, he gave, as I have already stated, another lease to the 6th defendant: he is not, however, shown to have done anything to support the 6th defendant's fruitless efforts to obtain possession, and from 1893, if not before that, he accepted rent from the transferees of the original lessee. I cannot find that after he became Matadhipathi he did anything to indicate an intention to avoid the lease, and, on the other hand, by accepting rent he did make clear his intention of adopting it. I am, therefore, able to accept the finding of the Subordinate Judge on this point.

The question of forfeiture does not in these circumstances require decision, and the only one remaining which I find it necessary to decide, is one which arises in Appeal No. 185, the 5th defendant's appeal, and not in No. 186.

It is thus owing to the failure of the holders of a portion of the land to pay the local cesses payable by the *inamdar*, there was a sale by the Revenue Authorities, and the 5th defendant became the purchaser. The question is whether he bought the right of the *Mutt*, or only that of the lessee in occupation. I am not able to agree on this point with the Subordinate Judge that the interest of the *Mutt* was not sold.

The facts are that the Deputy Tahsildar gave no notice of the sale to the *Mutt* but issued his notice only to Ramachariar, who had been paying the taxes. Ramachariar told the Deputy Tahsildar that he had sold his interest in the land to Narayanachariar and the Deputy Tahsildar put up the land for sale as that of Narayanachariar, and the sale-proceeds, after payment out of them of the amount due to the Local Board, were paid over to Narayanachariar: possession of the land was obtained by the 5th defendant but I do not find anything to show whether after the sale the *Mutt* continued to receive any rent for the land sold.

I have had considerable doubt whether on this evidence I ought not to hold that the Deputy Tahsildar sold and the 5th defendant bought the interest of the permanent lessees alone. If the 5th defendant had paid rent to the *Mutt*, that would have been clearer, but it is not shown that any rent was paid. On the whole, I think the Deputy Tahsildar intended to sell the defaulter's interest, *i.e.*, the interest of the owner, from whom the cesses were due, but thought that the person in occupation was the owner; the purchaser seems to have been under a similar mistake and to have thought that his purchase entitled him to possession as well as ownership.

The result is that the Deputy Tahsildar sold the interest of the defaulter, the *mutt* without giving notice to the Matadhipathi. The sale was irregular and liable to be set

aside, but passed the title and at the date of this suit it was too late to set it aside whether S. 59 of the Act II of 1864 or Article 12 of the second Schedule to the Limitation Act be the provision of law applicable to the case.

Appeal No. 185 will, on this ground, have to be allowed and the suit, so far as it is for possession of the land, dismissed ; the alternative prayer of the plaintiff for payment to him of the surplus sale-proceeds received by the 3rd defendant may be allowed, and the decree will be modified accordingly and will be that which my learned brother sets out in the judgment which he will now deliver.

Appeal No. 186 is dismissed with costs.

Sadasiva Aiyar, J.—Appeal No. 186 is the principal appeal. It has been brought by the 4th defendant, who is in possession of three-fourths share of the plaint village under deeds executed by the owners of the permanent lease right, which permanent lease right was created by the deed of 1872 in favour of Mudgala Chariar by the former Matadhipathi. I entirely agree, for the reasons given by my learned brother in the judgment just now pronounced by him, that the plaintiff was entitled to repudiate the lease as soon as he became Matadhipathi in March 1906 and to bring his suit for possession within twelve years of his becoming Matadhipathi. The Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (8), held that a reversioner, after the death of a Hindu widow, was entitled to bring his suit for possession within twelve years of her death, repudiating *in pais* the widow's alienation, and that such repudiation may be indicated by the institution of the suit itself. The position of a Matadhipathi is, (as pointed out by my learned brother), neither that of an absolute owner, (as he cannot ordinarily alienate the corpus), nor that of a mere tenant for life, (as he represents fully the ownership of the *Matam* properties for certain purposes), and is, therefore, in many ways analogous to that of the estate of a Hindu female heir to a male's estate. A Matadhipathi has been compared to a corporation sole in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) but (speaking for myself) I do not like to dwell on that analogy, as (unless we are very careful), that analogy might not only mislead us into the complication and difficulties of considering and construing the varied opinions given in English cases about corporations sole, but there is this fundamental distinction, namely, that whereas " the properties belonging to an English Bishop " (a corporation sole under the English Law) " including his savings from the revenues of the benefice, devolve upon his legal representatives or heirs ", the savings of a Matadhipathi devolve upon the succeeding Matadhipathi. I am also not at all sure that as regards even the income of the *Mutt* properties, a Matadhipathi has an absolute and unqualified power of disposition as a Bishop over the income of his benefice, that is, to squander it away in even immoral or extravagant ways. I should be very loath to come to the conclusion that S. 92 (1) of the Civil Procedure Code (corresponding to old S. 539) does not apply to *Mutts*, as was suggested during the course of the arguments in these cases, and that the public and the Advocate-General and the Courts of Justice are powerless to stop the wholesale misuse of the income of a charitable and religious institution like a *Matam*. In a recent case, the right to protect the religious institution was allowed to a mere disciple in management of the *Mutt* by my learned brother and Abdur Rahim, J. See *Kasi Chetty* v. *Srimathu Devasikhamony Nataraja Dikshitar* (9). I concurred with Sundara Aiyar, J., in the judgment reported of *Narsaya Upada* v. *Venkataramana Bhatta* (5) and I adhere to the opinion expressed therein as to the effect of the three recent Privy Council decisions beginning with *Abiram Goswami* v. *Shyama Charan Nandi* (3) discussed therein. In the result I agree with my learned brother that Appeal No. 186 should be dismissed with costs.

As regards Appeal No. 185, my conclusion is that it should be allowed. This appeal had been brought by the 5th defendant, who purchased the remaining one-fourth share in the village in a revenue sale held for recovery of road-cess due by the *Matam*. It is clear from S. 3 (10), S. 64 (2) and Ss. 66 and 73 of the Local Boards Act (V of 1884) that it is the *inamdar Matam*

(8) (1907) 34 Cal. 329=34 I. A. 87 (P.C.).

(9) (1912) 16 I. C. 622.

that was liable for the road-cess and not any tenant of the *Matam*. The revenue sale was held according to the procedure laid down by the Revenue Recovery Act, such procedure having been incorporated into the Local Boards Act by S. 76 of the latter Act. By Exhibit J1 (*b*), Ramachariar, on whom notice was served as the defaulter (that is, I take it as the landlord) *inamdar* informed the Deputy Tahsildar in April 1902 that he had sold away his "¼th share in the village" to Narayanachariar and that the amount should be collected from Narayanachariar, who was in possession of the one-fourth share in the village. Ramachariar did not inform the Deputy Tahsildar that he and Narayanachariar were not landlords but only lessees.

Exhibit J1 (*c*) shows that one-fourth share in the village itself was intended to be sold and not merely a lease right therein. I find it difficult to hold that what was sold was the right not of the defaulter, but the rights of a lessee of the defaulter, which lessee could not be made legally liable for the road-cess and whose lease rights also could not be made liable, as a sale held for road-cess under the Local Boards Act is not a sale free of encumbrances or under-tenures, but only the rights of the landholder as they stood on the date of sale. Though the sale *procedure* was that prescribed by the Revenue Recovery Act, the substantive provisions in the Revenue Recovery Act (Ss. 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases do not apply to a sale under the Local Boards Act. See *Ramachandra* v. *Pitchaikanni* (10) and *Chinnaswami Mudali* v. *Tirumalai Pillai and The Right Honourable the Secretary of State for India* (11). It seems to be better to hold (if it can be fairly so held) that a sale conducted by a Revenue Officer was conducted with jurisdiction, though irregularly, than to hold that it was conducted wholly without jurisdiction. Purchasers in sales held by Revenue Officers for realisation of public taxes should not have their title remaining in jeopardy for long, and public policy seems to me to require that, when such sales are attacked long afterwards on the ground of want of jurisdiction in the Officer conducting the sale, such ground should be strictly established by cogent evidence, which seems to me to be wanting in this case. (That the plaintiff himself thought that the sale was intended to convey away the *Mutt's* interest seems to be indicated by paragraphs 8 and 11 of the plaint. In paragraph 8 he calls the sale an "irregular revenue sale" held without jurisdiction. In paragraph 11 he prays in the alternative for the balance of the revenue sale amount). Taking it then, that the sale was held with jurisdiction, the irregularities committed by the Revenue Officer in having the notices served on Narayanachariar (the man in possession), treating him as the defaulter instead of on the real defaulter (the *Matam*), cannot be now made a basis for attacking the sale, as the time fixed by law for the setting aside of the sale on the ground of irregularities [See *Malkarjun* v. *Narhari* (12)] had expired long before the present suit was brought.

In the result, this appeal must be allowed with appellant's costs payable by the plaintiff and the order of the lower Court directing the plaintiff and the 3rd defendant to pay sums of money to the appellant will be set aside. A money-decree will be given in favour of the plaintiff against the third defendant for the sum of Rs. 382-8 balance of the revenue sale-proceeds with interest thereon at 6 per cent. per annum from the date of suit and proportionate costs on that amount from the 3rd defendant in the lower Court. To this extent, the lower Court's decree will be modified.

S. N./R. K.

Decree modified.

(10) (1884) 7 Mad. 434.
(11) (1902) 25 Mad. 572.
(12) (1901) 25 Bom. 337=27 I. A. 216 (P. C.).

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Full Bench.

WHITE, C.J., AYLING AND OLDFIELD, JJ.

John Howe—Petitioner.

v.

Charlotte Howe—Respondent.

Referred Case No. 14 of 1912, decided on 7th August 1913. made by Dist. Judge, South Malabar, in Civil Misc. Pet. No. 206 of 1911.

(a) Divorce Act ((4 of 1869), Ss. 11 and 17—Wife charged with adultery—Co-respondent's name not given—Courts order of making certain person co-respondent without amending petition is wrong.

In a petition for divorce the petitioner charged his wife with adultery but stated that he did not know any of the persons with whom adultery had been committed and asked to be excused from making the alleged adulterer a co-respondent; the Judge on his own initiative made an order making one *A*, a co-respondent:

Held, that, under the circumstances, the Judge was not called on to pass the order, and that he was certainly in error in not directing the amendment of the petition so that the allegations against the co-respondent might be stated therein. [P. 339, C. 1 & 2.]

(b) Evidence Act (1 of 1872), Ss. 118 and 120—Birth of child relied on as evidence of adultery—Evidence of non-access of husband is admissible.

Where the petitioner relied on the birth of a child during the divorce proceedings as evidence of adultery:

Held, that, under the law of this country, (Ss. 118, 120 of the Evidence Act), the evidence of the petitioner as to non-access was admissible. [P. 340, C. 2.]

(c) Evidence Act (1 of 1872), S. 112—Birth within 11 months of marital intercourse is legitimate.

A child born some 11 months after the marital intercourse between its parents had ceased is illegitimate. [P. 339, C. 2 & P. 342, C. 1.]

J. C. Adam, Amicus Curiae—for Petitioner.

C. Pattabhirama Aiyangar—for Respondent.

Judgment.—This case comes before us, under S. 17 of the Indian Divorce Act for confirmation of a decree for a dissolution of marriage made by a District Judge.

The petitioner alleged in his petition to the District Judge that the respondent had been living in adultery in his (the petitioner's) house and that she admitted that she was living the life of a prostitute. He also alleged that he did not know any of the persons with whom adultery had been committed and asked to be excused from making the alleged adulterers, co-respondents.

In the course of the proceedings, the learned Judge, on his own initiative, made an order making one Alexander a co-respondent. In view of the terms of the petition, and in the absence of any application by the petitioner, we do not think the learned Judge was called on to do this. In our opinion, he was certainly in error in not directing the amendment of the petition so that the allegations against the co-respondent might be stated therein. As the petition stands, it contains no allegations against the co-respondent. An order for substituted service of "notice" on Alexander was made, but he did not appear.

In this state of things, we think the best course to adopt is that suggested by Mr. J.C. Adam who, at our request appeared to support the decree, *i.e.*, to strike out Alexander's name and deal with the case as if he had not been made a co-respondent.

In paragraph No. 8 of his petition, the petitioner, with reference to his allegation that the respondent had been leading the life of a prostitute, asked to be excused from making any of the alleged adulterers co-respondents. He did not make any special application under S. 11 of the Act, and no order under the section was made by the Court. The effect of the absence of any formal order does not seem to us, in the circumstances of this case, to be a matter which we need consider, since we are unable to agree with the learned Judge in his findings with reference to the allegations in paragraphs Nos. 6 and 7 of the petition.

During the pendency of the proceedings, the respondent gave birth to a child. The case for the petitioner was that this child was born some 11 months after he had ceased to have marital intercourse with the respondent. He relied on the birth of this child as evidence of adultery. Here again the petition ought to have been amended. It is quite clear, however, that the respondent was in no way prejudiced or embarrassed in her defence by the fact that there was no amendment. The child was born on February 8th, 1912. The petitioner and his witnesses were examined on April 18th, 1912. They were not cross-examined on behalf of the respondent till September 24th, 1912. The respondent's witnesses were examined and cross-examined on that date. The explanation of the delay would seem to be (in part at any rate,) that when the suit came on for hearing in the first instance in April 1912, the respondent did not appear. On March 21st, 1912, she had applied for a

fortnight's adjournment and produced a medical certificate. She stated that she desired to defend the case. The case would seem to have been adjourned till April 18th. On that day, the respondent did not appear and made an application for a further adjournment. The suit proceeded on April 18th as an undefended suit and, after the evidence of the petitioner and of five witnesses called on his behalf had been heard, was adjourned. Subsequently an order was made (we are told with the consent of the petitioner) that the respondent should be allowed to defend the suit. One thing is clear and that is that the respondent had ample notice of the case made against her in connection with the birth of the child. Her case was that marital intercourse took place between the petitioner and herself during March, April and May 1911 and that the petitioner was the father of the child.

* * * *

Although the evidence called on behalf of the petitioner, in our opinion, does not establish adultery by the respondent prior to March 1911, it shows that she was a woman of loose habits and that her house was visited by men in the absence of her husband and against his wishes.

As regards the birth of the child, two questions arise—*first*, are the petitioner and respondent competent witnesses; *secondly*, if they are, are we warranted in holding, on the evidence taken as a whole, that the child is illegitimate? The general rule of the English Common Law that evidence of non-access by the husband is inadmissible for the pupose of proving illegitimacy is quite clear. In England, the Evidence Act of 1851, and the Evidence Amendment Act of 1853, left the parties to suits for divorce incompetent to give evidence. In 1857, when the English Divorce Act was passed, doubts were caused as to how far the old doctrines of the Common Law in relation to the competency of witnesses were to be recognised in the Divorce Court. It was accordingly enacted by the Evidence. Further Amendment Act of 1869, that the parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties should be competent to give evidence in such proceeding. (Taylor on Evidence, Edition 10, Vol. II, paragraphs 962, 963). The effect of this enactment is to make the parties to divorce proceedings competent to give evidence. It does not in terms abrogate, so far as divorce proceedings are concerned, the rule of the Common Law that "Neither husband nor wife can be examined for the purpose of proving non-access during marriage." See *R.* v. *Inhabitants of Sourton* (1). The judgment in *Guardian of Nottingham* v. *Tomkinson* (2) would seem to proceed on the assumption that in divorce proceedings instituted in consequence of adultery, the evidence of the husband is admissible to prove non-access. In *Burnaby* v. *Baillie* (3), North, J., declining to follow *In re Yearwoods Trusts* (4), held that evidence of the husband *after the dissolution of the marriage* was not admissible to prove the illegitimacy of a child born in wedlock. In *Pryor* v. *Pryor* (5), on a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree *nisi* and decree absolute, and fourteen months after the wife had eloped from her husband the Court refused to transfer funds in settlement to the parties free from the trusts of the settlement and also refused to order an inquiry into the legitimacy of the child. I would, however, observe that the decree was founded on the petitioner's evidence, which was not admissible to bastardize the child. We have not been able to find any English case where in a suit to divorce in which the husband relied on the birth of a child, which he alleged to be not his, as proof of adultery, the evidence of the husband as to non-access was tendered and extended.

We do not propose to discuss further the law of England, since we are of opinion that under the law of this country, the evidence of the petitioner as to non-access is admissible. We do not think it has ever been suggested that, at any rate, since the passing of the Indian Evidence Act, 1872, parties to proceedings under the Indian Divorce Act, 1869, are not

(1) (1836) 5 Ad. & E. 180.
(2) (1879) 4 C. P. D. 348.
(3) (1889) 42 Ch. D. 282.
(4) (1877) 5 Ch. D. 545.
(5) (1887) 12 P. D. 165.

competent witnesses. In England, the disabilities of parties as witnesses have been removed piecemeal by a series of legislative enactments. In India, we have the enabling enactment in S. 118 of the Evidence Act, that all persons are competent to testify, unless the Court considers they are prevented from understanding the questions put to them or from giving rational answers. We have the further enactment in S. 120 that in all civil proceedings, the parties to the suit, and the husband or wife of any party shall be competent witnesses.

It does not, of course, follow that, because the husband is a competent witness in divorce proceedings, his competency is not subject to the rule of the English Common Law as to evidence by him of non-access, assuming the rule would in England be held applicable in a case like the present. We think, however, the effect of S. 118, is to make the husband a witness for all purposes. In Ameer Ali and Woodroffe on the Law of Evidence, the learned authors observe (Edition 2, p. 771), after stating the English rule, that no such rule is to be found in or implied from the Evidence Act and in *Rozario* v. *Ingles* (6), the Bombay High Court took the view that the question was governed by S. 118 of the Evidence Act.

There remains the question what should be our finding of fact on the question whether the child born to the respondent in February 8, 1912, was the child of the petitioner or the result of some adulterous connection.

The petitioner would seem to have given his evidence candidly and honestly and without any desire to exaggerate. We believe his statement that there was no marital intercourse between him and the respondent after March 11, 1911. The respondent stated that there was marital intercourse between her and the petitioner at Malaparamba from March 4th, 1911. [She appears to have meant March 11th. That is the date given in her letter (Exhibit N), which agrees with the petitioner's evidence after the petitioner had left her and gone to Malaparamba until the end of May]. Her evidence is quite inconsistent with her letter of May 7th written to the petitioner's Vakil (Exhibit N) and with her letter of May 30th, 1911, to the petitioner's employers (Exhibit L). The learned Judge observed that the evidence of the respondent compared very unfavourably with the straightforward evidence of the petitioner. The petitioner's evidence is corroborated by the evidence as to the relations between the parties when he left the house at Calicut on March 11th and also by the evidence of a witness, Muhammad Ghos, called by the respondent, who stated that the respondent was in bed for three or four weeks after the petitioner left for Malaparamba and that when the respondent went to Malaparamba, she was pushed by the petitioner and not allowed to go inside the bungalow. We disbelieve the respondent's evidence on this question.

We hold it proved by admissible evidence that no matrimonial intercourse took place after March 11th, 1911, between the petitioner and the respondent. The case for the respondent was that the child was begotten by the petitioner after he left her and went to live at the Malaparamba house. As we disbelieve this evidence, it seems at least doubtful whether we are called upon to consider whether the child could have been begotten by the petitioner before March 11th. Having regard, however, to the language of S. 112 of the Evidence Act, it may be that it is necessary to deal with this question.

If the petitioner was the father of the child, the period of gestation must have been 333 or 334 days. In the print of the judgment, the period is stated to be 344 days. If the learned Judge said this, it would appear to be inaccurate.

A period of 333 days would be altogether abnormal. The opinions of the judicial authorities are cited in the judgment of the Allahabad High Court in *Tikam Singh* v. *Dhan Kunwar* (7). It would seem that it may be regarded as proved that the period may be 296 days and that most authorities agree that the interval may be as long as 308 days. The period fixed by the Legislature for the purposes of S. 112 of the Evidence Act is 280 days.

There may be some doubt whether in view of the language of S. 112, evidence as to the relations between the parties or evidence which pointed to immorality on

(6) (1894) 18 Bom. 468.

(7) (1902) 24 All. 445.

the part of the mother, or evidence of a long interval since the birth of a previous child is relevant to the question we are now dealing with, though these matters were taken into consideration in the Allahabad case to which we have referred. Under the law of England, the matter is one of presumption which may be rebutted. [See *Morris* v. *Davies* (8).] Under the Evidence Act, the fact that a child was born during the continuance of a valid marriage is conclusive proof of legitimany, unless it can be shown that the parties had no access to each other at any time *when the child* could have been begotten. It may be said that the considerations to which we have referred are irrelevant as regards the question whether the child could or could not have been begotton prior to March 11th. Under the section, it would seem that we have to decide whether the child could or could not have been begotten immediately before the date when the marital intercourse, which the law presumes, between the petitioner and the respondent, in fact, ceased. With regard to this, we are of opinion that, although there was no expert evidence in the Court below, we are entitled under S. 60 of the Evidence Act to consider and act upon the opinions of experts contained in the treatises to which we have referred. We are prepared to hold that it has been shown in this case that there was no access by the petitioner at any time during which the child could have been begotten. The decree is confirmed.

S. N./R. K.

Decree confirmed.

(8) 5 Cl. & F. 163.

A. I. R. 1916 Madras 342 (1)

OLDFIELD AND TYABJI, JJ.

Rajah of Vizayanagaram—Defendant—Appellant.

v.

Dokara Paidayya—Plaintiff—Respondent.

Second Appeals Nos. 1668 to 1670 of 1913, decided on 4th November, 1914, against the decrees of Dist., Judge, Vizagapatam, in Appeal Suits Nos. 229, 230 and 231 of 1912.

Madras Estates Land Act (1 of 1908), S. 112—Under S. 112 burden to prove cause for enhancement is on landlord—Deposit in Court to avoid sale does not shift it.

In a suit under S. 112 of the Madras Estates Land Act the burden of proof is rightly imposed on the landlord to show that he is justified in claiming rent at an enhanced rate; the fact of the payment into Court in order to avoid the sale does not shift the onus on to the tenant.

[P. 342, C. 2.]

S. Srinivasa Aiyangar—for Appellant.

Judgment.—These appeals are argued solely on the ground that the burden of proof was imposed wrongly on defendant. This is contended with reference to *Chunder Kant Mukerjee* v. *Hem Lal Mondal* (1), on the ground that "if plaintiff wanted the money back" which he had paid into Court, "it was for him to show that he had a right to get it."

In the present case the rent appears to have been paid into Court under S. 129 or 195 of the Estates Land Act in order to prevent the sale, in connection with which plaintiffs are suing under S. 112. Nothing in the Act indicates that the incidence of the burden of proof is affected by a payment into Court, nor we have been referred to any general principle authorising that view. On the other hand, the pleadings show that defendant was admittedly claiming rent at a higher rate than had been paid in the past; and the burden of proof that he was justified in doing so was rightly imposed on him, *vide* S. 27.

The appeals fail and are dismissed. Plaintiffs have not appeared. There will be no order as to costs.

S. N./R. K.

Appeals dismissed.

(1) (1897) 1 C. W. N. 463.

A. I. R. 1916 Madras 342 (2)

SADASIVA AIYAR AND NAPIER, JJ.

Veerammal and *another*—Defendants—Appellants.

v.

Kamu Ammal and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2660 of 1913, decided on 27th August, 1915, from the decree of Dist., Judge, Tanjore, in Appeal Suit No. 484 of 1912.

(a) Specific Relief Act (1 of 1877), S. 42—Suit by contingent reversioner for avoiding widow's alienation—Further declaration that reversioners are entitled to succeed is given—Order is not proper.

The only declaratory relief to which a contingent reversioner is ordinarily entitled when he disputes an alienation made by a Hindu widow is that the alienation is not binding beyond the life-time of the widow. Any other declaration *e.g.*, the order in which the reversioners should succeed on her death etc., is not in proper exercise of the discretion to grant declaratory reliefs. [P. 342, C. 2.]

(b) Hindu Law—Co-parcener—Relinquishment—Requirements of validity of relinquishments are stated.

The Hindu Law requires for the validity of a relinquishment by a co-parcener of his interest in the family property *only* that he should accept a trifle, and *not also* that he should be able to support himself otherwise by his own exertions. A. I. R. 1915 Mad. 113, Foll.

[P. 343, C. 2.]

G. S. Ramachandra Iyer—for Appellants.

K. S. Jayarama Iyer, for *V. C. Seshachariar* and *A. K. Madhava Rau*—for Respondents.

Facts.—The properties in suit originally belonged to a joint Hindu family consisting of one Narayanaswami and his son, Perianna. The former having relinquished his share of the joint family properties in favour of the latter by a duly registered deed of gift, the latter alone continued to enjoy the same and died in 1888 leaving him surviving his two widows a daughter by his first wife a son born dumb and insane by his second wife and his father. Thereupon the junior widow got into possession of the properties and enjoyed them till 1898 when Narayanaswami died. The senior widow then trespassed upon the properties and disturbances ensued which were, however, put an end to by a settlement whereby the senior widow was allotted some portions of the property for her share, the junior widow taking the rest. The widows then alienated portions of the properties which fell to the share of each. In the meanwhile the daughter of Perianna, who had been a minor during the disputes attained majority, and sued for a declaration that she was entitled to inherit the properties of Perianna after the life-time of the two widows, that the son of Perianna had no interest in those properties as he was incapacitated from inheriting the same by reason of his having been born a dumb and insane person and that the alienations made by the widows were not binding on her. Both the lower Courts granted her a decree as prayed for. The junior widow and the son appealed to the High Court.

Judgment.—The only declaratory relief to which a contingent reversioner is ordinarily entitled when he disputes the alienation by qualified female heirs, is that those alienations are not binding beyond the life-time of the qualified female owner or owners. The other declarations given by the first Court decree (confirmed by the Appellate Court), namely, "that the plaintiff be declared entitled to inherit the property after the death of defendants Nos. 1 and 2" and "that 3rd defendant had no interest, etc.," were unnecessary and the discretion of the Courts as to declaratory reliefs was not exercised properly in granting those two declarations. The decrees will be modified by striking out the words relating to the above two declarations. The decrees are confirmed in other respects. As regards the contention that the release, Exhibit I, was invalid under Hindu law, the only new argument brought forward by appellants' learned Vakil for re-considering our decision in *Thangavelu Pillai* v. *Doraisami Pillai* (1) was that the Hindu Law requires for the validity of a relinquishment by a co-parcener of his interest in the joint family property, not only that he should accept a trifle but also that he should be in possession of ability to support himself otherwise by his own exertions. The texts of Manu and Yajnavalkya relied upon for this contention, when they speak of the relinquishment by an "able" co-parcener of his right, do not make his "ability" (to earn his living) the test of the validity of the relinquishment, but intend to indicate [to repeat the language used in *Thangavelu Pillai* v. *Doraisami Pillai* (1)] that that will also afford "evidence of the deliberate and final character of the relinquishment."

As the second appeal has failed substantially, the 1st appellant will pay the resppondent's costs.

S.N./R.K.

Decree modified.

(1) A. I. R. 1915 Mad. 113=26 I.C. 211.

A. I. R. 1916 Madras 344

MILLER, J.

M. R. Srinivasa Row—Petitioner.

v.

Pichai Pillai—Respondent.

Civil Rev. Pet. No. 663 of 1913 decided on 29th October, 1913, against the order of Dist. Munsif, Mannargudi, in Original Petition No. 42 of 1913.

(a) Legal Practitioner's Act (1 of 1846)—Pleader appearing in criminal proceedings under S. 145, Criminal P.C. is rightly prevented from appearing for other side in subsequent civil suit.

A, a Pleader, appeared in proceeding in the Magistrate's Court under S. 145 of the Criminal Procedure Code and obtained an order for his client maintaining his possession until he was ousted by a Civil Court. Three years after the order, the unsuccessful party filed a civil suit in connection with the matter in dispute and *A*. appeared for the plaintiff to conduct his case, but, on the defendant's (his former client's) objection, he was prohibited by the Court from so appearing:

Held:

(1) that the Court was justified under R. 277 of the Civil Rules of Practice to make the order; [P. 344, C. 2.]

(2) that the civil suit was a matter connected with the previous criminal proceedings; [P. 344, C. 2.]

(3) that considering that a large number of documents of title were produced in the proceedings in the Magistrate's Court, it lay on the Pleader to satisfy the Court that in acting in that proceeding, he did not as a fact obtain from the then client any knowledge which would be of use to his present clients or that if he did obtain any such knowledge, then such knowledge was now, so to speak, public property available to any Pleader who could obtain inspection of the record of the proceeding. [P. 345 C. 2.]

(b) Legal Practitioner—Misconduct—Power of Court—No rule is necessary to prevent a pleader from appearing for opposite side.

No rule is necessary to enable a Subordinate Court, subject to correction by the High Court, to refuse audience to a Pleader in a case in which that Pleader by his very appearance is guilty of what will be viewed as professional misconduct. [P. 345, C. 1 & 2.]

T. R. Ramachandra Aiyar—for Petitioner.

T. R. Venkatarama Sastri—for Respondent.

Judgment.—In this case, the District Munsif has made an order prohibiting a second grade Pleader from appearing for the plaintiffs in Original Suit No. 32 of 1913 on his file.

The Pleader had appeared and acted in a proceeding in the Magistrate's Court under S. 145, Criminal Procedure Code, and had there obtained an order for his client maintaining his possession until he should be disturbed by a Civil Court. Original Suit No. 32 of 1913 was instituted, nearly three years after the date of this order, by the unsuccessful party in the Magisterial proceedings, and the Pleader filed the plaint on their behalf and appeared for the purpose of conducting the case but on the defendant's (his former client's) objection has been prohibited from doing so.

The District Munsif relies on R. 277 of the Civil Rules of Practice as justifying his order, and, in my opinion, he is, in substance, right. Mr. Ramachandra Aiyar contends that this rule, being in the Civil Rules of Practice, has no application when one of the proceedings in question is a proceeding in a Magistrate's Court. These rules of practice, as is seen by their preamble, are to be applied only in Civil Courts, but here the matter which gives rise to the question is Original Suit No. 32 of 1913, a proceeding in a Civil Court, and I am not inclined to restrict the word 'proceeding' in the earlier part of the rule to proceedings in a Civil Court when neither the language of the rule nor the preamble requires that limitation. It was further contended that the suit is not a "matter connected with the proceeding" before the Magistrate. I have had some doubt on this point, but I agree with Mr. Venkatrama Sastri's argument that the rule is not to be given too narrow a scope, and should be interpreted as liberally as its language will allow and I do not think it is very difficult to hold that Original Suit No. 32 of 1913 is a matter which, to use the words of Hall, V. C., in *Little* v. *Kingswood Collieries Company* (1), "flows out of the former proceedings" and "may be considered as something in the nature of a continuance of, or supplemental to" that proceeding. No doubt, the title and not the possession is to be decided in the suit, but that does not affect the present question, for the mere fact that the questions to be decided are different will not necessarily involve the conclusion that the two proceedings are unconnected. The suit is that which was indicated in the Magistrate's order and so flows out of it, it was necessitated by that order, and it

(1) (1882) 20 Ch. D. 733.

relates to the property with which that order was concerned and it is between the parties to that order.

In spite, therefore, of the lapse of three years between the one proceeding and the other, I am of opinion that the later is a matter connected with the earlier.

It was suggested at the end of his argument, though not taken as a ground in his petition, by Mr. Ramachandra Aiyar that R. 277 is *ultra vires* of the High Court, in the sense that it is not founded on any section of the Legal Practitioners Act which gives power to make it. It may be that this is so, but I do not think it necessary to search the statutes for enabling powers in this case. I may take it, for my present purpose, that the rule merely defines the view of the High Court as to what will amount to a sufficient reason for punishing a Pleader in the particular matter, that if a practitioner does not infringe the rule he will not lay himself open to punishment or reprimand, even though he may not attain to that standard of fidelity which may seem desirable in persons professing to deserve the degree of confidence which must of necessity be placed in a Legal Practitioner by his client. Of course, if a Pleader be found as a matter of fact to have disclosed to one client secrets confided to him in his capacity of legal adviser by another, that would give rise to different considerations which would not depend on the existence of a rule like R. 277 of the Civil Rules of Practice. Whether the two clients were ranged as opponents or not, such conduct would necessarily be grossly improper. Taking this view of the rule, I have to consider the further objection that the District Munsif had no jurisdiction to make the order. The rule, however, clearly empowers the Court, *i.e.*, the Court in which the 'connected matter' is under consideration, to authorise or refuse to authorize the Pleader to act, and I take the Munsif's order simply to amount to a refusal to give the necessary authority. If, in spite of the refusal, the Pleader were to continue to act it might be necessary to consider in what manner the District Munsif's authority is to be vindicated but it is not necessary to go into that question here. I do not suppose that any rule is necessary to enable a District Munsif, subject to correction by this Court, to refuse audience to a Pleader in a case in which that Pleader by his very appearance is guilty of what will be viewed as professional misconduct, and that is all, as I understand the matter, that has been really done by the District Munsif here, though the District Munsif does not take exactly that view of it.

There remains the question whether the District Munsif ought to have authorised the Pleader to act for the plaintiffs in Original Suit No. 32 of 1913.

Considering that a large number of documents of title were produced in the proceedings in the Magistrate's Court, it seems to me that it lay on the Pleader to satisfy the District Munsif that in acting in that proceeding he did not as a fact obtain from his then client any knowledge which would be of use to his present clients, or that, if he did obtain any such knowledge then, such knowledge is now, so to speak, public property available to any Pleader who can obtain inspection of the record of the proceeding in the Magistrate's Court. The Pleader did not satisfy the District Munsif on these points, and Mr. Ramachandra Aiyar did not satisfy me on them. As then, in my opinion, the Pleader has brought himself within the rule, I cannot say that the District Munsif has wrongly exercised his discretion in refusing him audience.

In declining to interfere on behalf of the Pleader, I think I ought to observe that the District Munsif is probably right in holding that he is not guilty of misconduct involving any moral turpitude. It is not shown, that is to say, nor do I see any reason to suspect, that he accepted the plaintiff's *vakalat* in order to make use of knowledge formerly derived from the defendant nor with any idea of making use of such knowledge. But the District Munsif is right in saying that he ought to have offered his services to the defendant before acting for the plaintiffs, and if it be objected that an unscrupulous defendant might easily in the circumstances have undertaken to employ him and then have refused after the plaintiffs had engaged some one else, one answer seems to be that the practitioners must, even at some risk or sacrifice, refrain from taking up positions calculated to impair the confidence reposed in them by their clients ; on grounds of policy, if on no

other ground, this suggests itself as the better course.

The District Munsif made the Pleader pay the costs of the argument before him, and I think he was right. In this Court, too, as the Pleader has persisted in his contention that the rule does not apply to him and so has necessitated argument in this case, he must pay the costs of the respondent.

A. I. R. 1916 Madras 346 (1)

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Brindavana Chandra Harischandana Jagaddevu Rajah Bahadur Garu—Plaintiff—Appellant.

v.

Jagannadha Singi Santo and *others*—Defendants—Respondents.

Civil Appeal No. 143 of 1912, decided on 30th November 1914, against the decree of Dist., Judge, Ganjam, in Original Suit No. 32 of 1905, dated 30th September 1911.

Madras Estates Land Act (1 of 1908), S. 6—Occupancy rights are conferred by S. 6 not only with respect to holdings but also encroachments provided they are possessed for more than 12 years before suit.

Tenants who have added to their holdings by encroachments and have been in possession of such encroachments for more than 12 years before 1st of July 1908 when the Madras Estates Land Act came into force, are deemed to be in possession of the whole of their holdings, including the encroachments, as *ryots* and to be entitled to occupancy rights under S. 6 of the Act; but if their possession commenced within 12 years of the suit, they are liable to be ejected. [P. 346, C. 1 & 2.]

S. Swaminadhan—for Appellant.

V. Ramesam—for Respondents.

Judgment.—We are not prepared to differ from the conclusions of the learned Judge as to the extent included in Exhibit I. We also agree with him that when tenants have added to their holdings by encroachment and have been in possession of such encroachments for more than twelve years before 1st of July 1908 when the Act came into force, they must be deemed to have been in possession of the whole of their holdings, including the encroachments, as *ryots* and so to be entitled to occupancy rights under S. 6 of the Act. But according to the finding of the learned Judge in paragraph 4 read with paragraphs 1*c* and 1*d*, defendants Nos. 12, 13, 15, 16, 17, 18, 19 and 23 were not tenants but simple trespassers, and according to the evidence of plaintiff's witnesses Nos. 3, 5 and 7, which is uncontradicted, their possession commenced within twelve years of suit and it is, therefore, open to the plaintiff to eject them. These respondents have not appeared, the decree must be modified accordingly with costs throughout as against these respondents. Otherwise the appeal is dismissed with costs of defendants Nos. 9 and 10.

S. N./R. K.

Decree modified.

A. I. R. 1916 Madras 346 (2)

SPENCER AND TYABJI, JJ.

Ramaraza Thevar and *others*—Defendants—Appellants.

v.

Velusami Thevar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1151 of 1913, decided on 18th December 1914, against the decree of Dist., Judge, Ramnad, in Appeal Suit No. 494 of 1912.

Madras Estates Land Act (1 of 1908), Ss. 3 (11), 24 and 77—Water naturally flowing over Ryot's land without benefit to cultivation does not come under S. 3 (11) and tenant is not liable for water rate.

Water flowing over a *ryot's* land on account of its favourable situation without benefiting the cultivation is not water "supplied or taken for the cultivation of the land" within the meaning of S. 3 (11) and no water-rate is chargeable on lands cultivated with the aid of such water. [P. 347, C. 1 & 2.]

C. S. Venkatachariar—for Appellants.

K. C. Desikachariar—for Respondents.

Judgment.—This appeal arises out of a suit for rent under S. 77 of the Madras Estates Land Act. The parties were at issue as to the amount of the rent due on the lands. The decision of this question depended upon whether anything is payable to the plaintiff "on account of the use and enjoyment of water supplied or taken for cultivation of land" under S. 3 (11) of the Act. The 1st issue was framed in the following form.

"Were the *punja* lands, said to be irrigated with tank water, so irrigated?"

The first Court held that "the tank water irrigated the defendants' *punjah*,

but that it flowed over it against the defendants' will and without benefiting defendants' crop."

The learned District Judge in appeal stated that "the question for decision was whether the plaint crops had or had not been raised with the assistance of the water of the landlord's tank." He then held that it was admitted that the water came to the defendants' land and the question that remained, therefore, was whether the water was "supplied or taken for cultivation of the land." The District Judge held that even if the defendants did not themselves "procure such supply, there can be no doubt about their lands being favourably situated for the production of wet crops, standing as they do in the way of water flowing from one tank to the other." The basis for this finding by the District Judge is apparently Exhibit H, which was an application by the plaintiff under S. 74 of the Act. The District Judge says the crops must have been standing on the date of this application and that this makes it certain that they were not ripe "at the date of the irrigation," that is, when the water flowed over the defendants' lands.

Exhibit H was not in itself evidence of the fact deduced from it by the District Judge. It may be that if the District Judge was inclined to rely on the oral evidence on behalf of the plaintiff, Exhibit H might have corroborated such oral evidence, on the ground that an application to the Revenue Officer to assess the value of the crops would not be made unless the crops were standing. But as it is the inference that the crops must have been standing at the date of Exhibit H and that therefore, they must have been benefited by a flow of water anterior to that date is unwarranted.

We are, therefore, of opinion that the finding of the District Judge is not arrived at on such evidence as was available to him, but on a document which in itself was not evidence for the finding. We will call for findings on the evidence on record on the following issues :—

(1) "Whether water was supplied or taken for the cultivation of the lands in question from the tank of the plaintiff."

(2) "Whether the said water benefited the cultivation."

In deciding the 2nd issue the District Judge will consider whether the water came to the said lands when the crops were ripe or prior to their becoming ripe.

The findings should be submitted within six weeks after the vacation and ten days will be allowed, for filing objections.

In compliance with the order contained in the above judgment the District Judge of Ramnad at Madura submitted the following.

Findings. * * * * *

"I find on the first issue that no water was 'taken' by defendants, or 'supplied' by plaintiffs, for the cultivation of the suit lands; but that D. W. Nos. 2 and 3 and other *ryots* holding lands under the small tank took water to that tank, from the big tank, for the cultivation of their *nunja* lands under the small tank, and that that water necessarily flowed over defendants' lands on its way to the small tank, but without the permission or knowledge of plaintiffs, and without any requisition or acquiescence on defendants' part;" and on the second issue "it is difficult to see how it can be held that the cultivation was benefited by the irrigation in question. I find this issue against plaintiffs and for defendants."

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following.

Judgment.—Accepting the findings we allow the second appeal and restore the decree of the first Court. The respondents will bear their own and appellants' costs in this Court and the lower Appellate Court.

S.N./R.K.

Appeal allowed; Suit dismissed.

A. I. R. 1916 Madras 347

SADASIVA AIYAR AND TYABJI, JJ.

Segu Chidambaramma—Plaintiff—Appellant.

v.

Sareddi Hussainamma and *others*—Defendants—Respondents.

Second Appeal No. 1495 of 1912, decided on 1st April, 1915, from the decree of Dist. Judge, Kurnool, in Appl. Suit No. 27 of 1911.

(a) Hindu Law—Alienation—Widow—Widow's alienation without necessity is binding only for her lifetime—Effect of her alienation without necessity is to divide the estate into two estates—Life estate and reversionary estate—She continues to hold the reversionary estate.

An alienation by a Hindu widow of her deceased husband's property not made for legal necessity is valid only during her life-time. A. I. R. 1915 Mad. 656, Foll. [P. 349, C. 2.]

An absolute estate vested in a widow becomes by her alienation for her own purpose (valid during her life-time) divided into two estates (1) a life estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her life-time. The ownership of the latter continues in her as part of the estate which she inherited from her husband and is available to her husband's creditors. 29 I. C. 241, Dist. [P. 349, C. 2.]

(b) Civil P. C. (5 of 1908), S. 60—Reversionary interest held by widow after alienation of life estate is not exempted from attachment and sale.

Such reversionary interest does not come under S. 60 (*m*) of the Civil Procedure Code and is not exempt from attachment where the judgment-debtor is not the presumptive or contingent reversioner but a widow representing her husband's estate fully and the transfer which would be made by the attachment and Court sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him but by the Court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow.) [P. 350, C. 1.]

(c) Evidence Act (1 of 1872), S. 102—Burden of proving that alienation is binding on husband's creditor or reversioner is on alienee from widow.

The burden of proving as against a creditor of the husband or as against a reversioner that an alienation by the widow is binding on the reversioner is on the alience. [P. 348, C. 2.]

V. C. Seshachari—for Appellant.

T. M. Krishnaswami Aiyar—for Respondents.

Judgment.—The learned District Judge is justified in his view on the burden of proof to this extent, namely, that the burden of proving that the alienation by the widow (1st defendant) to the 3rd defendant was nominal or without consideration, lay on the plaintiff who attached the plaint property for realizing the amount decreed to him as due by 1st defendant's deceased husband. We must accept his finding that the plaintiff has not discharged that burden. But there is the further question whether the alienation by the widow was made for such a necessary purpose as would bind the property after the widow's death and whether the plaintiff is not entitled to attach and bring to sale the said reversionary estate in execusion of his decree.

The burden of proving as against a creditor of the husband or as against a reversioner that an alienation by the widow is binding on the reversion is clearly on the alienee.

The learned District Judge says that "the defendants, no doubt, have not satisfactorily proved the necessity for the sale," but we are loath to accept and act upon that finding as the District Munsif had come to a different conclusion and the learned District Judge's above observation appears as a sort of *obiter dictum* in his judgment.

We shall, therefore, call for a fresh finding on the evidence already on the record on the question whether the alienation by the 1st defendant to 3rd defendant in 1899 was made for purposes binding on the reversionary interest in the plaint property.

The finding should be submitted within six weeks from the date of receipt of records and 10 days are allowed for filing objections to the finding.

In obedience to the above order the acting District Judge of Kurnool submitted the following.

Finding.—A finding has been called for on the following issue :—

"Whether the alienation by the 1st defendant to 3rd defendant in 1899 was made for purposes binding on the reversionary interest in the plaint property?"

2. In order that this issue may be found in the affirmative, it is necessary for the defence side to show that the alienation was for a purpose that comes under the category of legal necessity. For such proof, reliance is placed on the documents Exhibits II and III. Exhibit II is the sale-deed under which the property was sold by 1st defendant to third defendant in 1899, and it recites that the consideration amount was made up of three items :—

Rs. 28-8-0 due on a bond executed to 3rd defendant by 1st defendant's late husband ;

Rs. 10 due for miscellaneous items.

Rs. 41-8-0 borrowed for the obsequies of 1st defendant.

Exhibit III is a bond executed for Rs. 25 to the 3rd defendant, on 21st April 1898, and has been produced by 3rd defendant's son, the 3rd defendant having died pending the suit. But there is no proof of this document, which is intended to be evidence of the first item of the consideration amount stated in Exhibit II; and for the other two items that make up the consideration stated in that document there is no evidence at all, The second item of Rs. 10 for miscellaneous items would, it would appear, even if substantiated, have to be ruled out as not being one of necessity.

3. As the burden of proof which is on the defence has not been discharged, I find the issue in the negative.

This second appeal coming on for final hearing on Tuesday the 30th day of March 1915 after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, and having stood over for consideration till this day, the Court delivered the following,

JUDGMENT.

Sadasiva Aiyar, J.—The facts are as follows: The plaintiff is the decree-holder in Original Suit No. 311 of 1901 on the file of the Nandyal Munsiff's Court. The judgment-debtor is the first defendant, a Hindu widow who represented her husband's estate fully, and the decree was passed for a debt due by her husband. The plaint property was attached by the plaintiff (decree-holder) as belonging to her husband's estate. The attachment was made on the 11th November 1908, but the widow (the first defendant) had sold the property in 1899 itself to the third defendant, who sold it in his turn to the second defendant in 1905. The widow's sale was not made for necessity and was invalid beyond her life-time.

On these facts the question in second appeal is whether the plaintiff, who is the appellant before us, is or is not entitled to attach and bring to sale in execution of his decree in Original Suit No. 311 of 1901 that portion of the husband's estate which is left unaffected by the sale executed by the widow, that sale-deed, as we said before, not affecting more than that interest in the property which could enure during the widow's life-time. There are no doubt observations in several cases deprecating the description of a Hindu widow's estate as a life-interest, because she fully represents the estate for most purposes and nobody else represents any interest in the estate during her life-time and she is not a trustee for anybody (See paragraphs 624 and 625 of Mayne's Hindu Law). My own opinion is that when once it is admitted that she represents the estate fully, some of the Hindu Law texts which direct her not to alienate the estate except for necessary purposes are merely moral admonitions and a sale by her in contravention of those moral precepts does not fail to convey the absolute ownership to the purchaser. But authorities which cannot possibly be got over have held that an alienation not for legal necessity is only valid during her life-time, that is, it conveys to the purchaser only a right to enjoy during the widow's life-time. [See the very recent case of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (1).] When the full estate is vested in her and yet owing to the restrictions, which from being moral restrictions have become legal restrictions, she can convey only an interest to last during her life-time by a conveyance not for legal necessity, it seems to me to follow that the absolute estate vested in her becomes by her alienation for her own purposes (valid during her life-time) divided into two estates, (1) a life estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her life-time, both of which estates or rather the total of which belonged to her husband at his death. So far as her life-interest is concerned, it became by her alienation not available to the creditors of her husband, but the ownership of the remaining reversionary estate continues in her as part of the estate which she inherited from her husband. That seems to me to be available to her husband's creditors. Mr. T. M. Krishnaswami Aiyar relied upon the cases which have held that a presumptive reversioner has no interest in the property during the widow's life-time which can be attached by his creditor. [See the latest case of this Court *Kakaralapudi Lakshmi* v. *Rajah Kandu-*

(1) A. I. R. 1915 Mad. 656=26 I. C. 1.

kuri Veera Sarabha (2).] In my opinion, these decisions are irrelevant in the consideration of the question whether the widow as heir of her husband has still left in her some property belonging to her husband's estate which could be attached by her husband's creditor after she had made an alienation binding on her during her life-time. No person can claim during the widow's life-time, after the alienation of the widow's life-estate, to be the owner of that reversionary interest, but it does not follow therefrom that no reversionary interest, in property forming part of the husband's estate, is left after her alienation of her life-estate. If an interest belonging to the husband's estate is left, some legal person must be its owner. If a presumptive and contingent reversioner is not the legal person in whom the reversionary right exists, it must be the widow in whom the whole legal estate vested at her husband's death. If so, the decree holder, who obtained a decree against her as fully representing her husband, must be entitled to attach that reversionary interest remaining in her as part of her husband's estate.

S. 60, clause (*m*) of the Civil Procedure Code and S. 6, clause (*a*) of the Transfer of Property Act, are also relied on by Mr. T. M. Krishnaswami Aiyar. S. 60 (*m*) of the Civil Procedure Code prohibits the attachment of a judgment-debtor's expectancy of succession. S. 6 (*a*) of the Transfer of Property Act prohibits the transfer of the chance of an heir-apparent's succession by such heir-apparent. These statutory provisions again are, in my opinion, irrelevant to the consideration of the question before us, because the judgment-debtor here is not the presumptive or contingent reversioner but the widow representing her husband's estate fully, and the transfer which would be made by the attachment and Court sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him, but by the Court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow).

I would, therefore, answer the question which I put to myself in the beginning of the judgment in the affirmative, and setting aside the judgments of the lower Courts give a declaration to the plaintiff that the attachment made by him in execution of the decree in Original Suit No. 301 of 1901 is valid in respect of the reversionary interest in the properties subject to the life-interest of the widow. The parties will bear their respective costs throughout.

Tyabji, J.—I agree. It seems to me that the widow was a party to the proceeding in two capacities, (1) as to a life-interest in her own absolute right and (2) as to the reversion as the representative of her deceased husband's estate which is to devolve on his reversioner. She had no doubt purported to convey the property in both capacities, but it has been found that in so far as she purported to alienate the property in her latter capacity she had stepped beyond her legal powers and was not competent to bind the reversioner. She was on that account brought on the record so that the reversionary interest of her husband's estate may also be bound. The authorities to the effect that the presumptive reversioner's interest is such a mere expectancy as is referred to in the Transfer of Property Act, S. 6 (*a*), support this view. For, if the reversionary interest in the widow's husband's estate is a mere expectancy so far as the reversioner is concerned, the only person in whom "the legal estate" (I use that expression for brevity perhaps at the sacrifice of accuracy) can be said to be vested must be the widow.

S. N./R. K.

Appeal allowed.

(2) (1915) 29 I. C. 241.

A. I. R 1916 Madras 350

MILLER AND SADASIVA AIYAR, JJ.

Rajah of Ramnad—Plaintiff—Appellant.

v.

A. L. A. R. R. M. Arunachellam Chettiar and *others*—Defendants—Respondents.

First Appeal No. 28 of 1909, decided on 3rd March, 1913, against the decree of Sub-Judge Madura (East), in O. S. No. 30 of 1904.

(a) Limitation Act (9 of 1908), Art. 91—Suit to set aside instrument for undue influence is governed by Art. 91.

Article 91 of the Limitation Act applies to a suit to set aside an instrument on the ground of undue influence. [P. 352, C. 1.]

(b) Specific Relief Act (1 of 1877), S. 39—Rescission of sale must be effected by suit or written instrument.

If a sale is to be rescinded it must be by judicial rescission or a written instrument.

[P. 354, C. 1.]

(c) Evidence Act (1 of 1872), S. 102—(Per Sadasiva Aiyar, J.)—Burden of proof of—Custom of inalienability of impartible zemindaris is on person alleging.

Sadasiva Aiyar, J.—The onus of proving a custom of inalienability in the case of impartible *zemindaris* lies heavily on the person who alleges it. [P. 355, C. 1.]

(d) Trust Act (2 of 1882), S. 96—Scope of S. 96 stated—Chapter 10 of Trust Act lays down modes of ascertaining rights and liabilities of parties—It does not relieve parties from taking steps.

S. 96 of the Trusts Act was intended only to make provision consistent with the law in force for certain cases in which English Courts of Equity fastened a constructive or resulting trust upon holders of property and for which there was no statutory provision till then. Ownership and obligation should not be confounded in applying this rule.

[P. 354, C. 1 & P. 356, C. 2.]

Chapter IX of the Trusts ct sAets down only the principles that should govern Courts in ascertaining the rights and obligations of parties in certain cases and not to relieve a party from any obligation to take the necessary steps required by the substantive or adjective law before a trust could be validly established and created in his favour. [P. 356, C. 2.]

(e) Contract Act (9 of 1872), Ss. 64 and 66—unilateral repudiation of contract by plaintiff would not constitute rescission—It must be effected by a decree setting aside the contract.

A mere unilateral repudiation *in pais* by the plaintiff cannot constitute an effectual recission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside. [P. 356, C. 2.]

(f) Limitation Act (9 of 1908), Art. 91—Suit for possession from defendant lessee is governed by Art. 91 as lease must first be set aside—Time does not begin to run from the date of cessation of undue influence.

A suit for possession of immovable property when that relief is inconsistent with a registered lease-deed executed by plaintiff's predecessor-in-title is governed by Article 91 of the Limitation Act as it is necessary that the document should be first set aside. [P. 362, C. 2.]

For the application of the Article the cessation of the undue influence is not the period when time begins to run. [P. 363, C. 1.]

K. Srinivasa Aiyangar—for Appellant.

F. H. M. Corbet—for Respondents.

Miller, J.—This appeal arises from a suit in which the Rajah of Ramnad (the present sole plaintiff) prays the Court to hold that two leases executed by his father, one on the 5th of November 1889 and the other on the 2nd of June 1893, are not binding upon him and to direct the defendant to deliver to him possession of the property affected by them.

The principal ground on which the suit is based is that the lessee obtained the leases by the exercise of undue influence. That is denied by the defendants, who also raise many other pleas and, among them, a plea that the suit is barred by Article 91 of the second Schedule of the Limitation Act.

The original lessee died in 1899, and the plaintiff's father was then alive. The suit was instituted in 1904, and it is not contended before us, though it was contended in the Court below, that the undue influence continued, after the death of the lessee, to be exercised by his sons.

For the appellant it is argued that Article 91 is inapplicable to the case, *first* because it cannot, in any case, be applied to a suit founded on an allegation of undue influence, and *secondly*, because the suit is not a suit to cancel or set aside an instrument. As to the first contention, the 1st column of Article 91 does in terms apply to the suit because in no other Article is provision made for setting aside a deed executed under undue influence, but it is argued that the language of the 3rd column, the column in which the starting point of limitation is set out, is inapplicable to a case of undue influence and consequently the article must be held inapplicable. It is doubtless true that cases can be imagined in which the undue influence may continue for three years after the victim has become fully aware of all the facts entitling him to avoid the consequences of its exercise and may so prevent his taking action, but that possibility does not seem to me to indicate that the starting point is wholly inapplicable, it shows only that there may be cases in which its application would be a hardship. In very many, if not in most, cases of undue influence, the influence is utilised to distort or misrepresent material facts, and, though it must be confessed that there may be cases in which it will be difficult satisfactorily to apply Article 91,

it cannot be said that on its language it is altogether inapplicable and there is authority for its application which I am unable to disregard. In *Janki Kunwar* v. *Ajit Singh* (1), the Privy Council applied it to what, on their Lordships' statement of facts at page 64 of the report in the Calcutta series of the Indian Law Reports, was, it seems to me, clearly a case of undue influence ; it was applied also by Subrahmania Aiyar, J., in *Roop Laul* v. *Lakshmi Doss* (2), to a case of undue influence, and, though his view on the question of limitation was not accepted by the Full Bench, the applicability of Article 91 to the case as a case of undue influence was not questioned. It was held that it did not operate to prevent a defendant in possession from pleading the undue influence to protect his possession. The case in *Hasan Ali* v. *Nazo* (3), to which the Article was applied, seems also to have been a case of undue influence.

An observation of Subrahmania Aiyar, J., in *Roop Laul* v. *Lakshmi Doss* (2) suggests that the starting point might be held to be postponed till cessation of the undue influence ; that is a question which he had not to decide, and which it is unnecessary for us to decide, for even if that be so, this suit of 1904 was instituted more than three years after the cessation of the undue influence, which we may assume for the present purpose to have continued down to the death of Ramaswami Chetty in 1899.

I think Article 91 must, on its language and on authority, be held to be applicable to a suit to set aside an instrument on grounds of undue influence.

The second contention on behalf of the appellant is that the plaintiff, having elected to terminate the leases on the ground of undue influence, is now entitled to ask the Court for possession without any further setting aside of the instruments. The lease is terminated, the interest transferred to the lessee is re-vested in the lessor, and nothing remains but to give effect to his right to immediate possession. In *Janki Kunwar* v. *Ajit Singh* (1) the Privy Council, dealing with this question, observed that it was necessary to bring a suit to set aside the sale on payment of Rs. 1,25,000 before possession could be recovered ; but it is argued that that observation assumes the necessity and is not to be taken as laying down a rule of law that an instrument of transfer which is voidable by the transferor for undue influence can be avoided only by a decree of the Court ; or, if it was intended to lay down such a rule, that rule cannot be applied to a transfer made after the enactment of the Trusts Act and the Transfer of Property Act.

I do not feel justified in deciding that that is unnecessary which the Privy Council has declared to be necessary, unless it is quite clear that these enactments, which, it may be, did not apply to the sale dealt with in *Janki Kunwar* v. *Ajit Singh* (1) have altered the law upon this subject.

Mr. K. Srinivasa Aiyangar did not rest his case on any distinction between an 'ancillary' and a 'substantial' relief prayed for in the suit. I do not think he could do so in the face of the decision to which I have just referred. Then their Lordships lay it down that the immovable property (in that case) could not be recovered until the deed of sale had been set aside, and so far as this point is concerned, that case cannot be distinguished from the one before us. I think it, therefore, unnecessary to discuss the cases in India in which attempts have been made to distinguish *Janki Kunwar* v. *Ajit Singh* (1) and which in some cases proceed, as Mr. K. Srinivasa Aiyangar was prepared to admit, on differences which are without much substance.

It was necessary, then in the present case to set aside the leases before possession could be recovered by the Raja, and we have to consider the question whether he has already effectively set them aside, or whether the Court has to do so for him by its decree. In the latter event, the suit is barred by limitation.

Reliance was placed by Mr. K. Srinivasa Aiyangar on Ss. 64 and 66 of the Indian Contract Act and Ss. 126 of the Transfer of Property Act and S. 86 of the Trusts Act as showing that, whatever may be the case elsewhere, the law of India does not require the intervention of

(1) (1888) 15 Cal. 58=14 I. A. 148 (P.C.).
(2) (1906) 29 Mad. 1.
(3) (1889) 11 All. 456.

the Court to make effective an avoidance by the transferor, against the will of the transferee, of a transfer voidable at his option.

It is, I think, clear that neither the Indian Contract Act nor the Transfer of Property Act is inconsistent with a rule requiring a decree to set aside a transfer. Ss. 64 and 66 of the Contract Act were in force before the transfer dealt with in *Janki Kunwar* v. *Ajit Singh* (1), and, besides, do not provide for the method of rescission of a contract, and S. 126 of the Transfer of Property Act does not lay down the method to be adopted to effect the revocation of a gift ; these provisions may well co-exist with a rule of law that a transfer which can be effected only by a registered instrument can be avoided only by a formal re-transfer, or by the Court's decree, which may be a sufficient substitute for an instrument of re-transfer. And such a rule would, I conceive, be entirely in accordance with the policy of the law as indicated by the fourth proviso to S. 92 of the Evidence Act ; that proviso forbids proof of an oral agreement to rescind a contract, grant or disposition of property in cases in which the law requires the contract, grant or disposition to be effected by an instrument in writing. This rule has been said to be rule of positive law rather than of evidence ; the law will not enforce the agreement and so will not allow it to be proved ; but whatever be the foundation on which the rule is based it has the effect of preventing the rescission, by oral agreement, of a transfer which cannot be effected by oral agreement, but not of other transfers. The inference is that the law desires the same publicity and the same safe-guards in the case of a re-transfer as were required to support the original transfer, for, if a writing was unnecessary for the transfer, then it is unnecessary for the re-transfer, and consequently the rule cannot be put merely on the ground that documentary evidence is better than oral evidence. And the fact that the transferor has been wronged and is, therefore, in a position to compel the re-transfer seems to me to make no difference from this point of view : it is a concession to him if the decree of a Court under the Specific Relief Act is allowed to suffice to re-vest the transferee's interest in him, instead of the registered instrument required by the Transfer of Property Act. The English cases [*Clough* v. *London and North-Western Railway Co.* (4), *Oakes* v. *Turquand* (5) and *Reese River Silver Mining Co.* v. *Smith* (6)] cited by Mr. K. Srinivasa Aiyangar do not touch this particular question, and the analogy of the forfeiture of a lease, suggested by him, is not exact, for the title in that case is re-vested by virtue of a provision in the contract itself.

So far then as the provisions of the Transfer of Property Act and the Contract Act are concerned, I am unable to see any reason why I should hold that the observation of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (1) does not bind me or that the law is not in accordance with it. Mr. K. Srinivasa Aiyangar argued that, if that is so, *Lakshmi Doss* v. *Roop Laul* (7), and the cases which have allowed defendants in possession to plead undue influence after the time prescribed by Article 91 must be held to have been wrongly decided. That is not a question which we have to decide in this case, but, unless we are to hold that in each case a plea of undue influence is a counter-suit for setting aside the instrument, the conclusion we are asked to draw does not necessarily follow. The defendant is required to get the Court to set aside the instrument, but, if he can do so without a suit of his own, it is possible that he need not do it within the period provided by Article 91.

S. 86 of the Trusts Act raises a somewhat different question ; by that enactment, a transferee in possession under a voidable transfer must, on receipt of notice of rescission, hold the property for the benefit of the transferor, subject to repayment of the consideration actually paid.

The contention is that no further avoidance is necessary ; the transferor, as a constructive *cestui que trust*, has the right to compel the transferee, as constructive trustee, to surrender the property.

(4) (1852) 7 Ex. 26.
(5) 2 H. L. 325.
(6) 4 H. L. 64.
(7) (1907) 30 Mad. 169.

It is not at all clear to me that the plaintiff in this case can base any claim on this section. I do not find in the plaint any allegation that a notice of rescission was given to the defendants or their father before the suit, and the plaint itself is therefore the only notice available to the plaintiff wherewith to satisfy the requirements of the section. But the plaint is primarily a prayer to the Court to adjudicate upon a statement of claim, and can only operate as a notice to the defendants under S. 86 of the Trusts Act when a copy is served on them in due course, and that, in this country, is after the suit is duly instituted ; (*Vide* O. 5. Rr. 1 and 2, Civil Procedure Code). The defendants, therefore were not trustees under S. 86 at the date of the suit, and the right to immediate possession had not then vested in the plaintiff by virtue of that section.

But if I assumed the section to be applicable at all or if S. 89 can be held applicable, then S. 96 will, I think, operate to prevent their application here. For, as I have held, I am bound by the Privy Council decision to hold that there is a rule of law requiring that, if a sale is to be rescinded, it must be by judicial rescission or a written instrument, and that rule will apply to the present case. Now, in order to obtain a judicial rescission, the plaintiff must invoke the aid of the Court within the time allowed by Article 91 of the Second Schedule of the Limitation Act. This he has not done, and to allow him now to rely on S. 86 of the Trusts Act would be to place on the defendants an obligation of which they have been in effect relieved by Article 91—an obligation in evasion of that provision of the law. Again, S. 96 shows that Chapter IX of the Trusts Act was not intended to alter any provision of the law, but merely to make provision, so far as that could be done consistently with the laws already in force, for certain cases in which Courts of Equity in England fastened a constructive or resulting trust upon holders of property and for which in India, before the Trusts Act, there was no statutory provision. It follows that Chapter IX does not repeal the rule of law laid down by the Privy Council.

For these reasons I think Article 91 must be applied to the present case.

The question whether there is a custom in the Ramnad *zemindari* by which the alienations made by one *zemindar* are void as against his successor, was raised and presented to us for our consideration, but the evidence clearly negatives it, as my learned brother shows in his judgment, which I have read.

The appeal must be dismissed with costs.

Sadasiva Aiyar, **J.**—While I fully concur in the judgment just now pronounced by my learned brother, I consider that it is due to the strenuous and able arguments advanced by the appellant's learned Vakil that I should state in my own language my views on the question of limitation arising in this case. Though sixty-eight grounds are mentioned in the appeal memorandum as valid grounds for attacking the lower Court's judgment, it is unnecessary for the decision of this appeal to consider more than a few, as the other grounds relate to certain questions of fact and law, such as whether the defendants' father really exercised undue influence over the late Rajah and so on, which might all be assumed as decided in the plaintiff's favour, without actually deciding them. The 60th ground was abandoned. the appellant's learned Vakil conceding that the Privy Council decision in *Ramasami* v. *Bhaskara sami* (8) was against the contention raised in that ground (the contention being based on S. 11 of the Rent Recovery Act). Grounds 56 to 59 raised the contention that, by the custom of the estate the leases in question (one being a lease for 50 years and the other being a perpetual lease) were invalid beyond the late Rajah's lifetime, the late Rajah having died in December 1903, about 4 months before the suit was brought. But the plaintiff in his plaint (paragraphs 4 and 5 admits the power of his father (the late Rajah) to settle the *zemin* by a trust-deed on the plaintiff so as to be valid beyond the late Rajah's life ; the case of *Vijayasamy Thevar* v. *Sasivarma Thevar* (9) shows that in the Sivaganga *Zemindari* (carved out of Ramnad) no such custom, as contended for, against inalienability exists, and the decisions in *Sartaj Kuari* v. *Deoraj Kuari* (10), *Sivasubramania Naicker* v. *Krishnammal* (11)

(8) (1878-80) 2 Mad. 67.
(9) (1905) 28 Mad. 560.
(10) (1888) 10 All. 272=15 I. A. 51 (P. C.)
(11) (1895) 18 Mad. 287.

and *Sri Raja Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur* v. *The Court of Wards* (12) clearly establish that the onus of proving a custom of inalienability in the case of these impartible *zemindaris* lies heavily on the person who alleges it. (After the coming into force of the Madras Impartible Estates Act, the question of the right to alienate, of course, stands on an entirely different footing.) Far from there being any evidence of such custom in this case the evidence is almost wholly against the existence of any such custom. (See Exhibits CIII, CXL series, CXLIA, CXLIE, etc.) That before the decision in *Sartaj Kuari* v. *Deoraj Kuari* (10) it was erroneously thought by the Court, by the Revenue Officers and by the litigant public as a matter of law that impartible estates were inalienable, cannot constitute evidence of the custom of inalienability, which ought to be proved by cogent evidence as in the *Sivasubramania's* case (11). In fact, the contention raised by the grounds Nos. 56 to 59, though not abandoned by the appellant's learned Vakil, was only very slightly pressed before us and it must be decided against the appellant.

I have thus sufficiently cleared the ground for the consideration of the point of limitation, which was strenuously argued before us. The proper decision of that point depends on the answers to be given to the following questions :—

1. Is the plaintiff bound to have the leases in dispute set aside by a judicial pronouncement before obtaining the relief of possession and mesne profits claimed in this suit? (It is admitted, if I understood the respondent's Vakil right, that the relief of setting aside the leases might be given in the same suit in which the relief as to possession is claimed, and as ancillary to the relief awarding possession). Or is no such judicial pronouncement necessary, and whether the mere bringing of the suit by the plaintiff, alleging in the plaint that he or his father has repudiated the lease, or a mere oral declaration by the plaintiff or his father that he has repudiated the leases, is sufficient to put an end to the lease and to give a right to the plaintiff to obtain the relief as to possession and mesne profits? Whether even a repudiation is unnecessary, on the ground that the provisions of the Trusts Act entitled the plaintiff to treat the defendants as trustees of the plaint property for the plaintiff and to recover possession of the same from the defendants?

2. If a mere repudiation *in pais* (before or at the time of the plaint) would suffice, can it be made at any time (however long) after the date of the lease, or ought it to be made within the time fixed by law for the bringing of a suit to set aside the leases or, at least, within the time fixed by law for possession of the property?

3. Is Article 91 of the Limitation Act inapplicable to a suit which seeks such a declaration of the invalidity of the lease, on the ground that the plaint in the suit prays also for possession of immoveable property?

I am unable to accept the contention that, because Chapter IX of the Indian Trusts Act attempted to enunciate, in the form of sections, the principles which the Courts of Equity in England had established for their own guidance in order to fix wrong-doers with obligations to be fulfilled in favour of wronged persons, substantive rights and obligations were at once created by those sections without the person who invokes those principles in his favour being obliged to obtain the establishment of those rights by first invoking the aid of the Court in the manner indicated and provided for by law. The appellant's Vakil relies on Ss. 86 and 89 of the Trusts Act which are as follows :—

"Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to re-payment by the latter of the consideration actually paid."

"Where by exercise of undue influence any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced."

The wide phrases "hold the property" (S. 86) or "hold the advantage" (S. 89) "for the benefit" of the transferor, cannot be held to create at once an enforceable as distinguished from an establishable trust in

(12) (1899) 22 Mad. 383=26 I. A. 83. (P. C.)

favour of the transferor. The Chapter itself in which these sections occur, is headed thus : " Of certain obligations *in the nature of trusts.*" If a trust obligation has to be created and if the law requires that the creation of the trust itself (not an inchoate obligation in the nature of a trust) should be the act of the Court regularly invoked for that purpose the person who wants to benefit by the provisions of the Trusts Act ought to so invoke the aid of the Court for the effective creation of the trust within the time limited by law. I entirely agree with my learned brother that that is the effect of the last clause in S. 96 of the Trusts Act. That the contention on the appellant's side would lead to startling and anomalous results which could not have been intended by the Legislature, might be shown easily by a reference to S. 91 of the Trusts Act. That section is as follows :—

" Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

Can it be argued on this section that, because *A* the purchaser under a registered deed of sale with notice of a previous contract of sale in favour of *B.* " must hold the property for the benefit " of *B.* (the prior promisee from the vendor), *A.* became a complete trustee for *B.* on the date of *A.*'s sale-deed itself, and hence *B.* need not bring a suit for specific performance within three years of the date fixed for the performance (Article 113 of the Limitation Act), but might bring a suit within 12 years, nay, after any length of time, for possession of the lands against *A.* (the subsequent purchaser) as if *A.* had been created an express trustee for *B.* by the effect of S. 91 of the Trusts Act from the date of *A.*'s sale-deed ? If such construction of S. 91 of the Trusts Act is correct, S. 12 of the Specific Relief Act, which gives a discretion to the Court to give specific relief (in the above case, the relief would be the compelling of *B.* to execute a registered conveyance to *A.*) the provisions of the Transfer of Property Act requiring a registered conveyance to transfer property [see *Immudipattam Tirugnana Kondama Naick* v. *Periya Dorasami* (13] the provisions of the Evidence Act, S. 92, excluding oral proof of the setting aside of a registered document and requiring proof of such to be in writing, the provisions of S. 26 of the Specific Relief Act, requiring the Court to decree specific performance only subject to a variation in certain circumstances, might all be evaded and set at naught, as the Trusts Act, S. 91 merely uses the general expression that, if specific performance could be enforced (with or without variation and with or without conditions), *A*, must hold the property for the benefit of *B.* There might be cases coming under a few sections of Chapter IX, where a judicial declaration of trust might be unnecessary even when the beneficiary comes in as plaintiff, but the present is not such a case. Property in the hands of a mere constructive trustee does not become the property of the beneficiary under the constructive trust so as to enable him to treat it as such without a judicial declaration of the trust. As said in Lewin on Trusts, Chapter X, paragraph 18 ; " Until some judgment or decree has been obtained, the money " (in the possession of the person who obtained a pecuniary advantage by unfair use of fiduciary relation) " cannot be said to be the money of the principal." As said by Lindley, L. J., in *Lister* v. *Stubbs* (14) of such an argument, " the unsoundness of it consists in confounding ownership with obligation."

As I said before, a perusal of the whole of Chapter IX of the Trusts Act has left the clear impression on my mind that it was intended only to lay down the principles which ought to govern the Courts in India in ascertaining the rights and obligations of parties in certain cases, and not to relieve a party from any obligation to take the necessary steps (required by the substantive or adjective law to be taken by him) before a trust could be validly established and created in his favour. Similar observations apply to the argument based on Ss. 64, 65 and 66 of the Contract Act. A unilateral expression of a rescission of a contract by one of the parties to the contract cannot be held to relieve him from his obligation to have the contract rescinded by Court under the substantive law of the land and within the time allowed by statutory law, if he wants, as plaintiff, the assistance of the Court in obtaining certain reliefs on the basis that the contract has ceased to exist. The case of *Reese River Silver*

(13) (1901) 24 Mad. 377 ; 28 I. A. 46 (P. C.).

(14) (1890) 45 Ch. D. 1.

Mining & Co. v. *Smith* (6), quoted by the appellant's learned Vakil, does not (it seems to me) do away with the necessity of rescission by the Court in the case of a plaintiff. There are, no doubt, certain passages in Lord Hatherley's judgment tending in the appellant's favour, but the other learned Law Lords gave their verdict for the plaintiff only on the short ground that, as he had filed his bill in Chancery for rescission of his contract as a share-holder with the Company before the Company was ordered to be wound up, the rescission by Court related back to the date of the filing of the bill.

The argument of the appellant's learned Vakil, if I understood him aright, was that the law of the land does not require a judicial rescission of a contract or the judicial rescission of a registered lease-deed or conveyance in order to enable the party to a contract or the executant of a conveyance to sue for reliefs flowing from the rescission of the contract or setting aside of the conveyance, as the case may be, provided that he himself repudiates the contract or the conveyance, his own repudiation, if found, to be for good cause, having equal effect with a decree of Court rescinding the contract or setting aside the conveyance. In considering this question, who have to bear in mind that Courts of Equity in England were not bound by any law of limitation so far as the distinctive reliefs granted by such Courts were concerned. Equity, no doubt, tried to follow the law as much as possible and refused to grant equitable reliefs where the plaintiff was guilty of laches. Laches took the place of limitation but the ground covered by the two was not the same in many cases. For instance, the law of limitation never took note of the fact that a plaintiff was unable to bring his suit within the period prescribed owing to poverty, but the doctrine of laches allowed poverty to be a good excuse. Expressions, therefore, quoted from several of the cases decided by Court of Equity in England in which the effect of the repudiation by a party was not clearly distinguished from a judicial rescission, have not much force, because, where there is no question of limitation governing the power of the Court to grant a judicial rescission, repudiation for good cause by the party and judicial rescission for the same good cause by the Court when the matter comes before it can be practically put and talked of as if standing on the same footing. Again, even where the law of limitation affects the power of the Court to grant or declare a judicial rescission in *favour of a plaintiff*, the power of the Court to find *in favour of a defendant* that a proper rescission has taken place by the repudiation of defendant for good cause and the power of the Court on such a ground to non-suit the plaintiff, seem to be much larger as has been held in the Full Bench case of *Lakshmi Das* v. *Roop Laul* (7). The defendant, though his right to bring a suit for rescission of a contract or lease may be barred, might be permitted to defend his possession of properties by showing that the contract or lease so voidable at his instance has been repudiated by him. S. 28 of the Limitation Act is as follows:—"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." This shows that it is only where a person is under a necessity to institute a suit for possession of the property to which he lays a claim (and where the time for instituting such suit has lapsed), that his title to the property is extinguished. But if he is himself in possession and it is only his right to sue as plaintiff to set aside or declare invalid the deed or title set up by another man that is barred, he could defend his possession by pleading, as defendant, the voidability of the deed or title set up by the plaintiff who seeks possession. I am not sure that even the defendant, unless he has perfected his title by adverse possession, should not be deprived of his possession if there is a registered deed (corresponding to a deed under seal in English Law) which, *prima facie* has transferred title to the plaintiff, though it was voidable at the instance of the defendant, if the defendant had not brought the suit within the prescribed period to have that deed set aside. But the case of *Lakshmi Das* v. *Roop Laul* (7) has decided otherwise, though the learned Judges did admit the difficult nature of the question, and I do not wish to unsettle the law as fixed by that decision. A defendant who has properly repudiated a contract or a deed, might well be allowed to sit tight over his possession and defend his right to such possession by setting up by way of plea, each proper repudiation by him, though he might be barred if he seeks positive relief as plaintiff on the basis of such repudiation. Even a defendant could not, however, retain possession, if he had only a right to obtain a title-deed from

his vendor and had lost that right by limitation—see the judgment of the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* (15). If, as the appellant's learned Vakil, Mr. K. Srinivasa Aiyangar, contends, the vendor became a trustee for the purchaser as soon as the contract for sale was made, and also gave possession to the beneficiary purchaser of the property held in trust, he could not recover possession from the purchaser who had neglected to obtain the registered conveyance. But so far as a *plaintiff* seeking relief is concerned, the decision in *Lakshmi Doss* v. *Roop Laul* (7) does not help him; on the other hand, there are observations in that case to the effect that a plaintiff seeking relief cannot evade the statute of limitation like a defendant. The question is, therefore, now narrowed to this point. Is a litigant coming forward *as plaintiff* for a relief which he cannot get if a document executed by himself or his predecessor-in-title is in force on the date of suit, is such a litigant entitled to the relief of possession after the expiry of the time fixed by law for the setting aside of that document and simply on his allegation and proof that he has himself repudiated the document on proper grounds, assuming that the document is voidable at his instance? If he brings a suit for possession within the time limited by law for setting aside that document, that suit, of course, might be taken as brought for both the reliefs of possession and rescission, and there will be then no difficulty, the difficulty will arise only where the time fixed by law for a suit to set aside the document has lapsed, but the limitation for possession of the immovable property dealt with under the document has not elapsed and also in cases where the suit was brought after the expiry of the period fixed by law for the recovery of the property, if calculated from the date when the plaintiff became entitled to repudiate the contract, but within such period, if calculated from the date when he actually repudiated the contract or deed. However, it must be admitted that there is no Indian Statute expressly, laying down that a person who comes in as plaintiff claiming relief against the effect of a deed voidable at his instance, should have it judicially rescinded before or at the time of his getting that relief. But if judicial decisions have laid down the common law of the land as requiring such judicial rescission, and if there are implications to be found in the statute law supporting the judicial decisions as to the rules of the common law, we are bound to follow such decisions. The common-law being founded on common sense, many of its principles will be found laid down in English cases also. And if the principles so laid down by English decisions have been adopted by the Privy Council and by the Indian High Courts, they form part of the law, binding upon Indian Courts. Hence, though I do not wish usually to refer to the English Law, as numerous English decisions were referred to in the course of the arguments in this case, I shall very briefly refer to what I consider to be the result of those decisions. Isolated passages in several of those judgments can, no doubt by ingenious interpretation be made to support the appellant's view. I do not mean, however, to enter upon an elaborate refutation of the arguments advanced by the appellant's learned Vakil based on such passages. I shall merely refer to what Lord Halsbury in his Laws of England (Vol. XX, S. 1745) says on this point:—

"Where the representee has been induced by misrepresentation, whether fraudulent or innocent, to enter into a contract or transaction with the representor, which, unless and until rescinded, would be binding on the parties, such contract or transaction is voidable at the option of the representee. This means that the representee, on discovery of the truth, has a right to elect whether he will affirm or disaffirm the contract or transaction, and if he adopts the latter course, is entitled to give notice to the representor of repudiation, and demand from him a complete restoration of the *status quo*. In the event of his demand not being complied with, he may, subject to certain conditions and affirmative defences, *maintain an action or analogous proceedings for the purpose of having the contract or transaction declared void and rescinded by the Court, in which event it is deemed to have been void* ab initio."

This shows that where the repudiation is by one party alone, he cannot, as plaintiff, get any relief except as consequent on getting a declaration and a rescission by the Court. Of course, if the repudiation is accepted by the other side in the mode allowed by law, then the contract or transaction might be properly rescinded by the act of both parties without the intervention

(15) (1906) 29 Mad. 336, (F.B.)

of a Court. (See Ss. 62 and 63 of the Contract Act on this point). Or if the original contract or deed itself, by clauses of forfeiture or similar clauses, puts an end to the contract or transaction then also it is really determined by both parties, and the aid of the Court is not required. But in other cases, even though the contract or transaction is voidable at the instance of one party, its rescission is effectuated, not by the mere repudiation of one party, but by the decree or declaration of the Court. The form and extent of the relief are thus indicated in S. 1755 of Halsbury's Laws of England, Vol. XX. "The ordinary form in which the aid of the Court is invoked is an action, or counter-claim for rescission, in which, on discharging the necessary burden of allegation and proof, unless countervailed by any affirmative plea successfully raised by the representor, the representee is entitled to relief of a nature to effectuate the objects already indicated—that is to say, to an order rescinding or setting aside the contract, with or without a prefatory declaration, and, in certain special cases, to an order for the delivery up of the instrument in which the contract is contained or recorded to be cancelled, or for rescission of the conveyance by which it was completed and to such further orders for re-payment of money with interest re-conveyance and re-transfer, indemnity, not being in the nature of damages, injunction, accounts and inquiries, rectification of any entry in a statutory register which otherwise would or might import liability, and generally, and otherwise, all such directions as, in the circumstances of the particular case, may be required for the purposes of complete *restitutio ad integrum*; which means that, in his part, the representee must also make all such corresponding re-payments, re-transfers, and re-conveyances as are necessary to restore the *status quo* on both sides. Where the representee has simply paid money to the representor under the contract, and has received neither money nor money's worth in exchange, and so has nothing to restore, the proceeding assumes the form of an action for money had and received, which succeeds, or fails, *on precisely the same principles as if the action were for rescission*; and similarly, where the representee has parted with property or an instrument, without receiving any money or other benefit, the action may be in trover, or for the mere delivery up of the instrument to be cancelled, in which case again, the same principles apply." In Bigelow on Fraud at pages 75 to 79, the whole matter is put very lucidly: "There are three classes of cases in which rescission may be effected, each having a mode of its own. These classes, *nameless in the books*, may be severally termed 'rescission *in pais*,' 'judicial rescission,' and "rescission by plea (or answer)." Then the learned author says that rescission *in pais* is very rarely effective, that rescission by plea or answer [as in the case of *Lakshmi Doss* v. *Roop Laul* (7)] may be fully effectual in certain cases, and, lastly, that judicial rescission may fall under two sub-heads one, where it is a mere substitute for a rescission *in pais*, and the other, where acts of repudiation *in pais* are insufficient to rescind the contract or transaction or to restore the *status quo*. Then the learned author says "It (that is, judicial rescission) is the remedy for fraud in transfers of real estate, according to the general common law doctrine, for specialities, according to some authorities, and for fraud in contracts generally where tender and demand are insufficient or inappropriate for the end sought, or where there is nothing to tender because nothing has been received, and yet where a defence alleging the fraud might not afford sufficient relief." This, again, is clear authority for the proposition that a mere unilateral repudiation *in pais* by the plaintiff cannot constitute an effectual rescission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside.

Now let us see whether the Indian Legislature has indicated, at least by implication, that contracts and deeds *prima facie* binding on the plaintiff, as entered into by himself or as executed by himself or his predecessor, ought to be judicially set aside as a necessary preliminary to the granting to the plaintiff of reliefs consequent upon the wiping out of the contract or deed. The Contract Act, S. 2, clause (*i*) defines a voidable contract thus:—"An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract." S. 10 says: "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful

consideration and with a lawful object, and are not hereby expressely declared to be void." S. 14 says: "Consent is said to be free when it is not caused by coercion undue influence, fraud, mis-representation or mistake." Reading S. 10 and 14 together, therefore, an agreement to which consent is caused by coercion, etc., is not a contract. However, Ss. 19 and 19-A loosely call an agreement caused by coercion etc., as a *contract* voidable at the option of the party whose consent was so caused. Then S. 19-A is most important section; it is as follows:—

"When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely, or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(*a*) "*A*'s son has forged *B*.'s name to a promissory note. *B*. under threat of prosecuting *A*.'s son, obtains a bond from *A*. for the amount of the forged note. *If B. sues on this bond, the Court may set the bond aside.*

(*b*) *A*., a money-lender, advances Rs. 100 to *B*., an agriculturist, and by undue influence, induces *B*. to execute a bond for Rs. 200 with interest at 6 per cent. per month. *The Court may set the bond aside, ordering B. to re-pay the* Rs. 100 *with such interest as may seem just.*"

I think this section clearly indicates that, as regards a contract voidable by the plaintiff or the defendant on the ground of undue influence, the Legislature though it calls it a voidable contract, clearly intended that, in order that the avoiding by the party might be effectual to set aside the contract, the bond, even when the defendant raises a plea in answer to the plaintiff's action on the bond as in the first illustration, and, of course, when the obligor is the plaintiff (which seems to be the meaning of the second illustration), ought to be set aside by the Court in favour of the defendant or the plaintiff as the case may be. Chapter IV, S. 35, of the Specific Relief Act provides for the Court rescinding a contract voidable or terminable by the plaintiff, and also, where a contract of sale or lease, has been made and the purchaser or lessee makes default in payment of the purchase-money or the premium money after a decree for specific performance had been passed. Again, the Limitation Act prescribes a limitation of one year in Articles 11 and 11-A for suits to set aside certain judicial orders, in Article 12 (*a*) the same period to set aside sales in execution of a decree of a Civil Court or of a Revenue Officer or held for recovery of arrears of Government Revenue and so on, and in Articles 13, 14, and 15 for setting aside other similar orders of public authorities. Article 44 of the Act prescribes a period of three years for a suit by a ward (to set aside alienations by his guardian) calculated from the date when the minor attains majority. Article 91 provides a three years' limitation period for a suit to cancel or set aside an instrument not otherwise provided for. Article 95 gives again three years for setting aside a decree obtained by fraud or for other relief on the ground of fraud. Article 113 provides three years for specific performance of a contract. Article 114 provides three years for a suit for rescission of a contract. Let us take the case mentioned in Article 95. Supposing there is a decree obtained by *A*. through fraud, declaring against *B*, that *A*. is entitled to retain as against *B*. the suit land as absolute owner, though really *A*. was only a permissive tenant of *B*. in respect of the land, having obtained possession of the land as such permissive tenant one year before the decree was passed. *B*. knows of the fraud two years after the decree is passed. He keeps quiet for four years and then sues for possession of the land, he being then barred from bringing a suit to set aside the declaratory decree obtained through fraud by *A*. It seems to me clear that that fraudulenlty obtained decree, which has not been set aside, must stand in his way. Similarly, it seems to me that the other Articles, including the article relevant to this case *viz*., Article 91 will stand in the way of a plaintiff suing for the relief claimed by him against the tenour of the decisions or instruments, as the case may be, to which he has been a party and which are binding on him till set aside by the Court. In a very recent Article in page 55 of the Madras Law Journal (February) Mr. Shephard says that S. 36 of the Specific Relief Act indicates that "rescission imports a judicial decision" and that "recission by a person entitled to rescind means that he, having resolved not to persist in demanding performance, is *in*

a position to sue for rescission or to defend an action brought on the contract." If he allows the time (prescribed by the Indian Law of Limitation) to sue for rescission to pass, his rescission *in pais* cannot entitle him to sue for any other relief on the basis that the confract has been set aside, though, as a defendant, he may be allowed to defend his possession in a suit brought by the other party, provided his title to the property in dispute has not passed to the other party by the effect of a registered deed under the provisions of a statute giving such effect to such a deed. Even in the latter case, if he has acquired a title by prescriptive possession, he can, of course, successfully put forward that plea.

(I may add that, in this case, the 2nd lease sought to be set aside, though it is called a perpetual lease, is really a conveyance, as though there is a sum nominally reserved as rent, that sum is wholly to be paid to the Government towards the revenue due upon the leased land and the late Rajah followed up the lease, which is dated 1893, by another instrument of 1894, Exhibit E, by the effect of which the defendants' father was even relieved of his obligation to pay the *peishkush* through or on behalf of the late Rajah and was allowed thereafter to pay it to Government direct. The Government, in accordance with the wishes of the Rajah, sub-divided the leased lands as a separate estate and registered it in the defendant's father's name. Whatever the parties may choose to call this transaction, effected by the deeds of 1893 and 1894 (Exhibits C2 and E), I am unable to entertain any doubt that they constitute an absolute conveyance of the properties mentioned in them in favour of Ramaswamy Chetty. The late Rajah could not claim even a pepper-corn rent from the defendant's father after the document of 1894 and he retained absolutely no interest in those properties).

Having considered the common law and the implications of the statute law, I shall refer to a few of the decisions passed in Indian cases. Naturally the leading decision of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (1) has to be first considered. That case arose out of a suit brought by the plaintiff on the 18th February 1884 to obtain the cancellation of a deed of sale, dated the 29th July 1872, (on the ground that it had been obtained from the plaintiff and her late husband by fraud and undue influence), and to have the property conveyed by the sale restored to the plaintiff's possession with mesne profits and costs upon certain conditions to be imposed on the plaintiff. Though the suit was brought within 12 years of the plaintiff's having lost possession of the conveyed property, the Privy Council held that the suit fell under Article 91 and was barred. Criticising the judgment of the lower Court, their Lordships say as follows:—"Then the Judicial Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immovable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immovable property in the sense to which this limitation of 12 years is applicable. The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Article 91 of the Act XV of 1877 and is, therefore, barred." The appellant's learned Vakil sought to distinguish this case by arguing that the Privy Council dealt with the case of a document voidable for fraud and not for undue influence. The facts of the case, however, clearly show that it was a case of undue influence. The word "fraud" is, no doubt used in some places, but that word when used by Courts is not confined to its meaning as defined in S. 17 of the Contract Act. Courts have always refused to define fraud exhaustively, as it is as hydraheaded as the devices of human ingenuity. Every unfair means used to obtain unconscionable advantage over another is spoken of as "fraud." In *Sundaram* v. *Sithammal* (16), the suit was brought in 1889 for possession of land conveyed away in 1883 by one of the plaintiffs. The conveyance was found to have been obtained by undue influence. The two learned Judges who formed the Bench upheld the plaintiff's claim on the ground that Article 91 did not apply but Article 144. With the greatest respect I must dissent from the ruling in this case, as, in my opinion, it is clearly opposed to the decision of their Lordships of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (1). One of

(16) (1893) 16 Mad. 311.

the learned Judges distinguished the case in *Janki Kunwar* v. *Ajit Singh* (1) on the ground that the plaintiffs in this latter case asked for a decree for their property being restored upon their paying to the defendants so much of the consideration money as might be found to be justly due under the sale-deed which was impugned and the plaintiffs did not ask for a decree for unconditional possession. I am (with the greatest respect) unable to appreciate the distinction. The other learned Judge sought to distinguish the case of *Janki Kunwar* v. *Ajit Singh* (1) on the ground that the plaintiffs in that case came into Court expressly asking that the deed should be set aside as obtained by fraud and undue influence, whereas in the case of *Sundaram* v. *Sithammal* (16) the plaintiffs did not pray for any such relief. I am equally unable to see how the ingenuity of a party in the wording of the reliefs claimable by him can effect the question of limitation. Their Lordships of the Privy Council in *Malkurjun* v. *Narahari* (17) dealt with some arguments employed by the Bombay High Court in *Bhagvant Govind* v. *Kondi* (18), similar to the arguments employed in *Sundaram* v. *Sithammal* (16) and remarked that they found it "impossible to grasp the reasoning behind such observations." The case in *Malkarjun* v. *Narahari* (17) arose out of a suit for redemption of the plaint property brought without setting aside a judicial sale under which the mortgaged properties had been sold away irregularly in satisfaction of a money-decree against the plaintiff's predecessor-in-title, the mortgagee having purchased the equity of redemption in such Court sale. I shall here quote some of the observations of their Lordships in this case. "A sale, valid until set aside, can be legally and *literally* set aside; and anybody who desires relief inconsistent with it *may and should* pray to set it aside." If a sale is a reality at all, it is a reality *defeasible only in the way pointed out by law*. "In the adoption case just cited in *Jagadamba Chowdarani* v. *Dakhina Mohan* (19) this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property is left open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe Article 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold *that both the letter and the spirit of the Limitation Act* require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the Article."

I think the principle underlying these remarks of their Lordships apply as aptly to a suit for possession of immoveable property, when that relief is inconsistent with a registered lease-deed executed by the plaintiff's predecessor-in-title, and I hold that the plaintiff, who desires a relief inconsistent with the said document, may and should pray to set it aside, and that the letter and spirit of Article 91 of the Limitation Act require that such a suit should fall within the prohibition of the Article. In *Ranga Reddi* v. *Narayana Reddi* (20) a suit for possession of properties conveyed away by the minor's guardian, brought more than three years after the minor attained majority but within twelve years of the sale, was held to be barred by limitation, the learned Judges applying Article 44 and holding that Article 144 did not apply to that case. It seems to me that, if even a ward is obliged to have an alienation by his guardian set aside by a judicial declaration before he could recover the property, it is an *a fortiori* case where the alienation was made by an adult plaintiff himself or his predecessor-in-title. An alienation by a guardian beyond his powers is really void, whereas an alienation by an adult is only voidable. The principle of the decision in *Ranga Reddi* v. *Narayana Reddi* (19) is accepted as correct in the cases in *Madugula Latchiaha* v. *Pally Mukkalinga* (21), *Sivavadevelu Pillay* v. *Poonammal* (22), and *Chunder Nath Bose* v. *Ram Nidhi Pal* (23). I am, therefore, clear that Article 91 of the Limitation Act must be applied to this case.

Then there was the further argument of the appellant's learned Vakil that Art. 91

(17) (1901) 25 Bom. 337; 27 I. A. 216 (P.C.).
(18) (1890) 14 Bom. 279.
(19) (1886) 13 Cal. 308=13 I. A. 84 (P. C.).
(20) (1905) 28 Mad. 423.
(21) (1907) 30 Mad. 393.
(22) (1912) 15 I.C. 365.
(23) (1902) 6 C.W.N. 863.

should not be applied to cases of undue influence, as the period from which time runs is stated to be the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him; and, as in most cases the facts are not at once known to the person against whom the undue influence is exercised, the Legislature could not have intended that Article to apply to cases of undue influence. I need only say that the Privy Council did apply that Article to the case of undue influence in *Janki Kunwar* v. *Ajit Singh* (1) and even Sir S. Subramania Aiyar in *Roop Laul* v. *Lashmi Doss* (2), applied that Article, though he thought that the time from which the period begins to run might be the cessation of undue influence and not the time when the facts become known to the plaintiff. I am, however, unable to hold that the cessation of undue influence can fix the time from which the period begins to run when the Legislature has clearly fixed another period. Formerly, in English Law the period when a man was in prison was excluded from computation against him. All those rules are now obsolete and we have to look to the plain words of the statute, which is based principally on considerations of public policy, and we cannot allow considerations as to hardship in the case of particular plaintiffs to override the plain provision of the Act. The Limitation Act provides exceptions on the ground of the plaintiff's disability or inability to sue in Ss. 7, 8 and 13 (the last section relating to the *defendant's* absence from British India and not to the plaintiff's and the first two relating to the plaintiff's being a minor, an insane man or an idiot). As Mitra says "The exceptions recognised by the Legislature are founded on its own idea of expediency, that is, on what it considers expedient upon the balance of convenience and inconvenience. The Judge and the lawyer arguing analogically from the reason of the law cannot engraft a new exception upon the rule." I am, therefore, clear that new exceptions based on the fact of the plaintiff's having been in prison or the plaintiff's having been out of British India or his having been under undue influence (or even wrongful restraint at the defendant's instance) for a long time cannot be grafted upon the Limitation Act. In the present case, even if Sir S. Subramania Aiyar's cautious *obiter dictum* as to the cessation of undue influence giving the starting point of limitation be followed, the suit is clearly barred.

I do not think it necessary to refer in detail to the contention of the appellants' learned Vakil that the repudiation *in pais* might be made by him any number of years after the date of the transaction (as the Limitation Act does not deal with repudiation *in pais*) and to his further contention that he has a period of 12 years to sue from such repudiation for possession of the lands. In fact his contention came to this, that he could indefinitely postpone the commencement of the limitation period at his pleasure. Even in the exceptional case of a Hindu reversioner, their Lordships of the Privy Council, while holding that he could repudiate the alienation without having it set aside by a suit, did not state that he could take his own time for the repudiation and have 12 years again from the date of repudiation. [See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (24)]. Their Lordships only held that the repudiation might be within the 12 years granted for bringing the suit for possession, the commencement of limitation for the latter relief having nothing to do with the date of repudiation.

In the result, I agree that the appeal must be dismissed with costs.

S.N./R.K.

Appeal dismissed.

(24) (1907) 34 Cal. 329=34 I. A, 87 (P. C.).

A. I. R. 1916 Madras 363

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Ettisheri Edathil Samandan Chathappa Nambiar and *another*—Plaintiffs—Appellants.

v.

Pothera Kalloor Koman and *others*—Defendants—Respondents.

Civil Appeal No. 186 of 1912, decided on 11th December 1914, against the decree of Dist., Judge, North Malabar, in Original Suit No. 9 of 1911.

Trust—Removal of trustee—Trustee *in futuro* is not entitled to present possession—For breach of trust proper remedy is removal.

A person entitled to the office of a trustee only *in futuro*, has no subsisting interest and cannot sue for possession of trust properties *in praesenti*. [P. 364, C. 1.]

Where a breach of trust is alleged against the trustees in office, the proper remedy is a suit for their removal from office and appointment of a Receiver pending appointment of new trustees. [P. 364, C. 1.]

J. L. Rosario—for Appellants.

C. Madhavan Nair—for Respondents.

Judgment.—We think the District Judge was right in this case in holding that the plaintiffs were not entitled to sue for possession of property alleged to belong to the temple. They are not at present *urallars* of the temple, though they may some day become so by becoming the senior members of their *tarwads*. They have, therefore, no subsisting interest entitling them to possession. If the present trustees have improperly alienated properties belonging to the temple to be recovered by the 1st defendant, the remedy is to sue for the removal of the trustees, when in a proper case a Receiver can be appointed to recover possession for the trust pending the appointment of new trustees. It is unnecessary to express any opinion as to whether the present suit was barred as *res judicata*, as held by the District Judge.

The appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 364

BENSON AND SUNDARA AIYAR, JJ.

Logadapatti Chinnayya—Defendant—Petitioner.

v.

Kotla Ramanna—Respondent.

Civil Misc. Petn. No. 2455 of 1910, decided on 10th March, 1913.

(a) Decree—Setting aside—Fraud—Court came to wrong conclusion on evidence before it is no ground to set aside decree—The remedy is by appeal.

It is indisputable that a decree may be vacated on the ground that it was obtained by the successful party by fraud. But an unsuccessful party cannot be allowed to get round the rule of *res judicata* and to prove that the judgment was wrong; because the Court came to a wrong conclusion on the evidence before it. [P. 365, C. 2.]

The mode of rectifying an erroneous judgment is by appeal or by review.) [P. 365, C. 2.]

(b) Decree—Setting aside—Fraud—Fraud must be extraneous and not one already judged—Rule allowing vacating a decree for fraud is not an exception to rule of res judicata but independent of it—Power to set aside decree is discretionary.

A fraud to vacate the judgment must be extraneous to everything which has been adjudicated upon by the Court and not any fraud which has been already dealt with by the Court. The rule allowing the vacating of judgment for fraud is not an exception to the rule of *res judicata* but is independent and outside the scope of that principle. The judgment of Court includes the decision of the questions whether the testimony of any witnesses is true or false and whether the document produced in evidence is genuine or not. [P. 365, C. 2, & P. 366, C. 1.]

The power of Court to set aside a judgment on the ground of fraud is discretionary.

P. Somasundaram—for Petitioner.

K. V. L. Narasimham—for Respondent.

Order.—This is an application made under R. 8 of the rules applicable to the Godavari agency asking us to direct the agent to review his judgment in an appeal by which he confirmed the decree of the Assistant Agent of Bhadrachalam. The facts which led up to the case may be very briefly stated. The appellant, who was the defendant in the first Court, instituted Original Suit No. 16 of 1906 in that Court for the recovery of a sum of Rs. 643-9-0 from the present plaintiff alleged to be due on dealings between the parties. The present plaintiff filed a written statement alleging that some items in the account sued on had been wrongly debited against him and denying the accuracy and reliability of the accounts put in by the present defendant. A Commissioner was appointed to scrutinise the accounts and to report on the result. The present plaintiff did not put in appearance on the day fixed for the hearing of the suit. The present defendant was examined as a witness and a decree was passed in his favour for the amount sued for. An appeal was preferred by the present plaintiff to the agent, but the decree was confirmed by him and this Court also refused to interfere with the appellate decree of the agent. The present suit has been instituted to set aside the former decree on the ground that it was obtained by fraud and for an injunction to restrain the defendant from executing it. The only allegation of fraud that was insisted on at the hearing was that the defendant having bought from the plaintiff timber worth Rs. 1,026-14-0 did not give him credit for the whole amount but only for Rs. 610-2-0. It will be observed that this allegation is at variance with the defence made by the present plaintiff in Original Suit No. 16 in which his allegation was that certain items were wrongly debited against him in the defendant's account. In answer to the

present suit, the defendant alleged that the contract for the sale of timber referred to by the plaintiff was made on his behalf by his son in his absence, that it was a part of the agreement, that the timber should be of a certain quality, that what was supplied by the plaintiff was not of the quality agreed to, that he in consequence refused to ratify the sale and that the plaintiff agreed to an arrangement whereby the defendant sold the timber at Rajahmundry and credited the actual sale proceeds, Rs. 610-2-0 after deducting the expenses, to the plaintiff's account. The assistant agent at first dismissed the suit on the ground that it was barred by the rule of *res judicata* in consequence of the previous judgment and that the ground alleged by the plaintiff for setting aside the decree did not amount to such fraud as woud entitle him to get the previous judgment vacated. On appeal the agent set aside that judgment on the ground that the plaintiff's allegation in the plaint that the defendant fraudulently kept back certain accounts from examination by the Commissioner was an averment of fraud which would entitle him to have the previous judgment vacated, if he could prove the allegation. After remand witnesses were examined on both sides. The defendant also put in two documemts in support of his case. The assistant agent, however, came to the conclusion that the defendant did not succeed in proving the arrangement set up by him. He did not find that any accounts were withheld by the defendant from the Commissioner at the trial of Original Suit No. 16 as alleged in the plaint. Having thus found that the defendant ought to have given credit for Rs. 1,026-14-0 and not for Rs. 610-2-0 to the plaintiff, he observed "To this extent, therefore, the entry in defendant's accounts was fraudulant and defendant was not entitled to the decree he obtained in Original Suit No. 16 of 1906 against the plaintiff on the strength of these accounts." He, therefore, set aside the decree and granted an injunction restraining the defendant from executing it. He concluded with a somewhat unintelligible observation, "As there is good reason to conclude that the litigation in this suit is merely fictitious each party will bear his own costs throughout." On appeal the Agent modified the Assistant Agent's judgment by restraining the appellant from executing the decree in Original Suit No. 16 only to the extent of Rs. 416-12-0, the amount of the loss which the plaintiff suffered by the incorrect entry in the defendant's account. His finding of fraud was expressed in these terms "As appellants swore to the accuracy of the accounts and they have been proved inaccurate to the extent of Rs. 416-12-0 he must be said to have obtained his original decree fraudulently and respondent was entitled to have it set aside to that extent." The learned Vakil for the petitioner in this Court contends that no fraud such as would entitle the plaintiff to get the decree in Original Suit No. 16 set aside has been proved, that all that has been found by the lower Courts is that the decree in Original Suit No. 16 was incorrect and that this finding is based on evidence let in by the plaintiff which he might and ought to have let in Original Suit No. 16 and which he by his own carelessness failed to adduce then. The respondent contends that on the finding of the lower Courts, the evidence given on oath by the defendants at the trial of Original Suit No. 16 was perjured testimony and a decree obtained by perjured evidence may be set aside on the ground of fraud. It is indisputable that a decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of the judgment. The unsucessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. The allegation of fraud for vacating a judgment, therefore, must be extraneous to everything which has been adjudicated on by the Court and not any fraud which has

already been dealt with by the Court. The rule allowing the vacating of a judgment for fraud is not an exception to the rule of *res judicata* but is independent and outside the scope of that principle. In the *Duchess of Kingston's* case (1), Sir William De Grey, Lord Chief Justice, observed with regard to the judgment of a competent Court, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court and not to be impeached from within, yet, like all other acts of the highest judicial authority it is impeachable from without : although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act ; which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal. [see *Duchess of Kingston's* case (1)]. The effect of this pronouncement is that the correctness of the judgment of a Court of competent jurisdiction cannot be impeached ; but it may be shown that the value of the judgment, assuming it to be correct, is destroyed by collateral or extrinsic fraud in the obtaining of it. Now the judgment of a Court includes the decision of the questions whether the testimony of any witness is true or false and whether a document produced in evidence is genuine or not. These questions are not extraneous or collateral to the judgment, but are steps which led to the final adjudication of the Court, quite as much as its opinion as to the effect of the evidence adduced and the inference to be drawn from it. The parties in a suit are entitled to convince the Court that the evidence given by their respective witnesses is true and proves the contentions they urge. It stands to reason, therefore, that the unsuccessful party cannot be allowed to resort to a fresh suit in order to make a fresh attempt to show that the evidence which was insisted on by his opponent as true was, in reality, false and to characterise such insistance as fraud in obtaining the judgment. Nor can he be permitted to do so by adducing fresh evidence for the purpose, for it was his duty to place all his evidence, before the Court at the former trial. In *Patch* v. *Ward* (2) Lord Cairns, L. J. observad. "Now, it is necessary to bear in mind what is meant and what must be meant by fraud, when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, the *Duchess of Kingston's* case (1)." Then, his Lordship cites the passage already quoted above and proceeds to explain it. "The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." There can be no undue advantage taken of another by a party in putting any matter before the Court to be adjudged by it to be true or false. Both parties are entitled to invoke the judgment of the Court and to convince it of the truth of the evidence adduced by them respectively. It is true that parties ought not to let in false evidence, and that it is highly improper and immoral to do so. But it is the function of the Court to decide whether the evidence is true or false. If the adducing of false evidence can be spoken as a fraud, then the Court, in deciding the case, must be taken to have adjudged whether such fraud has been committed or not, and what it has once adjudged it cannot be called upon to decide again. The test to be applied is "is the fraud complained of not something that was included in what has been already adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court ; but where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards, claim to show that the allegation of his opponent was false. Assuming that he could prove the charge that would not amount to proving fraud on the part of his opponent because the Court has already decided that his opponent's

(1) 2 Sm. L. C. 731=20 How. St. Tr. 537.
(2) L. R. 3 Ch. 203=18 L. T. 134.

allegation was true and not false. If he could show that his opponent prevented him by an independent collateral wrongful act, such as by keeping his witnesses in confinement, or by stealing his documents, from adducing his evidence, that would be an act of fraud which would entitle him to get the Court's decree set aside. Fraud must be something which would destroy or seriously impair the value of the judgment by showing that one of the parties was prevented by the other from conducting his litigation fairly or by being deprived of the materials which he was entitled to place before the Court. Black in his Article on 'Judgments' in 23 Cyclopædia of American Law and Procedure includes the following acts in fraud which would vacate a judgment, misrepresentation or tricks practised upon defendant, keeping him away from the trial, preventing him from claiming his rights in the premises or setting up an available defence; acting contrary to an agreement between the parties that the case should not be continued or that defendant's time to answer should be extended or that the action should be dismissed as the result of compromise or settlement, or that the case would not be pressed to a judgment. The same learned author says in his treatise on 'Judgments' Vol. 1, S. 321: "There may well be cases of fraud in the cause of action or in the manner of procuring the instrument in suit, where the Courts would not withhold relief on motion: as where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defence, and could not have discovered it by due diligence, or where he was fraudulently prevented from setting it up at the proper time." But a judgment cannot be set aside for fraud on the ground that one of the parties to the suit acted improperly in the conduct of it when such conduct falls within the province of adjudication by the Court. The right of a party to insist on his opponent acting with truth and honesty in the conduct of the suit must, in the interests of finality of litigation be taken to be exhausted with the adjudication by the Court. He may, for instance, compel his opponent to produce all documents relevant to the suit, but it would be dangerous to hold that he may set aside the Court's judgment on the ground of fraud because his opponent did not produce them. He may compel him to give evidence in his behalf, but he must be satisfied with what he can do for this purpose in the course of the suit itself. The law has prescribed means for the punishment of a person who perjures himself or fails to produce documents which he is legally bound to produce but there would be no end to litigation, if his improper conduct in these matters can be made the means of setting aside the judgment of the Court by a fresh suit. He might go on re-agitating the same matter by successive suits to the end of his life, and his heirs might then take it up as an inheritance. Moreover, he might, after a superior appellate Court has adjudicated against him, institute a suit in an inferior Court to set aside the superior Court's judgment, as he would be entitled to institute his suit in the lowest Court competent to try it; see *Nistarini Dassi* v. *Nundo Lal Bose* (3), and *Sarthakram Maiti* v. *Nando Ram Maiti* (4). It must be admitted that there is a conflict in the opinions of eminent Judges as to what exactly would constitute fraud in any particular case for the purpose of the vacating of a judgment. But the principle appears to be laid down with clearness in the *Duchess of Kingston's* case (1) as something which is collateral to the matters adjudged by the Court. In the *Bank of Australasia* v. *Nias* (5), a decree was obtained in Australia on a contract. The decree-holder then brought a suit in England on the judgment of the Colonial Court. The defendant pleaded that the alleged contract on which the decree was passed was not true, and that, if true it was obtained and procured by fraud by the plaintiffs and others in collusion with them. Lord Campbell delivering the judgment of the Court of the Queen's Bench disallowed these pleas, holding that they do not amount to an averment of fraud. He observed: "The pleas demurred to might have been pleaded, and, if there be any foundation for them, they ought to have been pleaded in the original action. They must now be taken to have been in due manner decided against the defendant. . . . We are bound to take judicial notice that by the law and constitution of this Empire there is an appeal from it (that is, the decision of the Australian Court) to Her Majesty, who would refer the appeal to the Judicial Committee of Her Privy Council. I will not take notice of the fact of there having been an appeal; but I may say that either there has or there has

(3) (1903) 30 Cal. 369.
(4) (1907) 11 C. W. N. 579.
(5) 16 Q. B. 717=20 L. J. Q. B. 284.

not been an appeal ; in either case, it seems contrary to principle and expediency for the same questions to be again submitted to a Jury in this country. A regular mode having been provided by which an erroneous judgment of a Colonial Court may be examined and reversed, that mode ought to be pursued. Before the Judicial Committee, the Judges there presiding would fairly examine the judgment, and only set it aside if it was unjust. But, although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a Jury. Although the *onus probandi* is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses, whom he may suborn, to prove that the Company never made the promises which were the foundation of the judgment, or that, these promises were obtained by the fraud and covin of the plaintiffs."

Folwer v. *Lloyd* (6) is an important case on the question. There the plaintiffs brought an action against the defendants to restrain alleged infringements of a patent process. It was ultimately dismissed by the Court of Appeal. They then instituted another action to have it declared that the judgment on appeal had been obtained by fraud and for consequential relief. The alleged fraud consisted in the defendant's keeping back from an expert, who had been appointed to inspect the defendant's process, certain materials relating to the process in his possession and in making a false statement relevent to the matter of the inquiry. The Court of Appeal held that the plaintiff had failed to prove his allegation, but James, L. J., with the concurrence of Thesiger, L. J., proceeded to make certain important observations as to the nature of the fraud to be proved in such a case. He observed: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed, before it is answered in the affirmative ; where is litigation to end if a judgment obtained in an action fought out adversely between two litigant *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury ; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely ; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds,....." Baggally, L. J., did not agree in these observations but reserved for himself an opportunity of fully considering the question of law. In *Ex parte Alice Cockerell* (7) an application to set aside on the ground of fraud an order obtained by a married woman for permission to convey her interest in the property bequeathed to her was dismissed. Lord Coleridge, C. J., observed : "If it can be shown that the order was obtained by fraud or by the suppression of information which it was essential that the Court should have, the Court will, undoubtedly, set aside the order." The decision cannot be taken to lay down that every party is bound to bring voluntarily before the Court all matters that have a material bearing on the questions at issue and that every suppression of information by a litigant would make a decree in his favour liable to be set aside. It does not appear whether any notice was given to the husband before the order was passed. If the wife was entitled to an *ex parte* order, it was her duty to place certain facts before the Court, her suppressing them would be a ground for setting the order aside. Generally an *ex parte* order could be re-called on

(6) (1879) 10 Ch. D. 327=39 L. T. 613.

(7) (1878) 4 Com. Pleas. Dn. 39=27 W.R.366.

sufficient grounds being shown by the opponent, apart from any question of fraud. *Abouloff* v. *Oppenheimer and Company* (8) perhaps marks a departure from the view taken in *Folwer* v. *Lloyd* (6). A suit was filed in England on a judgment obtained in a Russian Court. The judgment was one directing the defendant to return to the plaintiff certain goods belonging to him or in default, that the plaintiff should recover their value. The defendants did not admit that judgment was obtained in Russia by the plaintiff but alleged that, if it was, it was obtained by the gross fraud of the plaintiff and of her husband because the goods in question were, at the time of the suit and of the judgment, in the possession of the plaintiff, and of her husband and that fact was concealed from the Court. The Court held that the plaintiff was entitled to have this plea tried. It is not quite clear how far the judgment of Coleridge, C. J., was due to the fact that the suit was on a foreign judgment. Brett, L. J., and Baggallay, L.J., were apparently of opinion that the same rule would be applicable whether the action was on the judgment of a Court in England or upon a foreign judgment. It will be observed that the question raised in the action in the English Court was whether goods belonging to the plaintiff were really detained by the defendant at the time of the action in the Russian Court. That is, whether the claim adjudged by the Russian Court to be a good one was in reality a fraudulent claim, and that no collateral fraud was alleged. Brett, L.J., observed " It has been contended that the same issue ought not to be tried in an English Court which was tried in the Russian Courts, but I agree that the question whether the Russian Courts were deceived, never could be an issue in the action tried by them. That question may be raised in the Russian Court in order to determine the matters which were in issue; but I think it true to say that the judgment of Knight Bruce, V. C., in *Barrs* v. *Jackson* (9) does show that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties, either to maintain or to defend other issues therein raised. In the present instance, the issue in the Russian Courts would be whether the defendants were wrongfully detaining the goods of the plaintiff. The question of fact whether the plaintiff had the goods in her possession at the moment when the action was commenced, would be a circumstance very material to be considered in order to determine that issue, but in the present action, upon this paragraph of the defence the only issue is whether the judgment of the Russian Courts was obtained by the fraud of the plaintiff successfully perpetrated on those Courts. The issues in the two actions are not the same; and therefore, the defendants are not estopped from setting up in this action the same evidence that was adduced at the trial of the action in the Russian Courts. I wish to say, however, that I am strongly of opinion that in the present action no question can be raised whether the judgment of the Russian Courts was erroneous;.....the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud, is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it." There can be no doubt that, if the issue in the two actions was different, there would be no question of *res judicata*, although the same evidence might bear upon both the issues, but were the issues different? The question in Russian action was whether the plaintiff's goods were wrongfully detained by the defendant. If they were not, the plaintiff's claim was fraudulent. The only fraud complained of in the English action was that the claim was fraudulent in that it sought to recover goods which were really in the plaintiff's own possession. That was the identical issue tried by the Russian Court. That Court decided that the claim was not fraudulent. There was no fraud on the Court unless the making of fraudulent claim is a fraud on the Court. Brett, L, J. distinguishes *Folwer* v. *Lloyd* (6) on the facts of the case. One distinction drawn is that, in *Folwer* v. *Lloyd* (6), fraud was committed not before the Court itself at the trial of the action but previously to the case being brought to a hearing before the Court. But is this the right test to be applied? Is not the proper test whether the fraud complained of was or was not adjudged by the Court in the previous suit itself to be not made out? Coleridge, C. J., appears to have based his judgment in part at least on the ground that a judgment when impeached was a foreign judgment, with respect to which it has been often held that it is only

(8) (1883) 10 Q. B. D. 295=52 L. J. Q. B. 1.
(9) 1 Ph. 582=14 L.J. Ch. 433.

prima facie evidence of the fact established by it. See *Ochsenbein* v. *Paplier* (10).

This is the view taken of *Abouloff* v. *Oppenheimer and Company* (8) by the Supreme Court of the United States in *United States* v. *Thorckmorton* (11). In *Vadala* v. *Lawes* (12), *Abouloff* v. *Oppenheimer and Company Ltd.*, (8) was accepted as correct ; but apparently only on the ground that it was binding on the Court Lindley, L. J., observed that there was no distinction between a foreign judgment and a domestic judgment when it was impeached on the ground of fraud. The facts relied on in the case as constituting fraud were not quite similar to those in *Abouloff* v. *Oppenheimer and Company* (8). Lindley, L. J., observed that there were two rules which ought to be borne in mind. *First* that a party to an action can impeach a judgment in it for fraud, and *secondly*, the merits of an action which have been tried cannot be re-opened. The question was which rule was to prevail. He went on and observed : " Until *Abouloff's* case (8) the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff* v. *Oppenheimer and Company* (8) and it was decided. I cannot fritter away that judgment and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the facts that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case, even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon.....The Counsel for the plaintiff have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying, that you cannot re-try the merits." Referring to the judgment of Brett, L. J., he said that the proposition laid down by his Lordship can only be applicable to cases where there is what is called extraneous fraud, such as imposition on the Court itself, but he held that the effect of the judgment in that case was to enable the defendant to re-open the judgment by showing that it was based on false evidence. He observed, referring to the judgment of Baggally, L. J.: "That is to say, not only where there has been a fraud on the Court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence that is such a fraud as would enable the defendant to impeach the foreign judgment." His Lordship concluded as follows :—" It appears to me, therefore, impossible in the face of that case, to differ from the view taken by the Divisional Court." In *Baker* v. *Wadsworth* (13), on the other hand, the Court refused to set aside the decree on the ground that it was obtained by perjured evidence. Wright, J., observed " There is no authority that the mere proof that a verdict and judgment have been obtained by perjury is sufficient to induce the Court to set the judgment aside and the expressions of the Lords Justices in *Folwer* v. *Lloyd* (6) are strongly against such a proposition." In *Cole* v. *Langford* (14) where judgment had been given in default of pleading by the defendant, the plaintiff made a motion to set aside the judgment on the ground of fraud. The allegation of fraud was that the judgment was obtained by exhibiting to the Court and the Jury certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the matters in issue in the action. The judgment was set aside. Ridley, J., gave no reasons for doing so. Phillimore, J., relied on the case of *Priestman* v. *Thomas* (15). But that case merely decided that the question whether a Will was a forgery or not was *res judicata* by a judgment passed in prior proceedings between the parties, setting aside on the ground of fraud. The result of the English cases is that, until *Abouloff* v. *Openheimer and Company* (8) it was held that the fraud complained of should not be a matter already adjudged by the Court but should be collateral to it. But, in that case, it was held that, notwithstanding a prior adjudication that the

(10) (1873) 8 Ch. App. 695=42 L.J. Ch. 861.
(11) 98 U. S. 93=8 Otto 61.
(12) (1890) 25 Q. B. D. 310=63 L. T. 128.
(13) (1898) 67 L. J. Q. B. 301.
(14) (1898) 2 Q. B. 36=67 L. J. Q. B. 698.
(15) 53 L. J. P. 109=9 P. D. 210.

fraud complained of was not true or not proved, a subsequent complaint of the same fraud without any further allegation raised a new issue whether the previous judgment was obtained by fraud. This rule was not acted upon in *Baker* v. *Wadsworth* (13) at any rate, so far as fraud consisting in perjured testimony being put before the Court was concerned. In the American Courts although there appears to be some conflict of judicial opinion on the question whether perjured testimony of the party to the litigation or subornation of perjury by him could be regarded as fraud for the purpose of vacating a judgment, the Supreme Court held, in the case of *United States* v. *Throckmorton* (11) that it could not be so regarded. (See 23 Cyclopædia of American Law and Procedure page 921, Note 75). Mr. Justice Miller, delivering the opinion of the Court, expounded the scope of the rule that a judgment may be set aside for fraud thus, "in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary, trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from Court, a false promise of a compromise; or where the defendant never had knowledge of the suit being kept in ignorance by the acts of the plaintiff ; or where an Attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the Attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." The learned Judge has reviewed both the English and the American authorities on the question. *Greene* v. *Greene* (16) explained the position thus : "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried or so in issue that it might have been tried, it is not again admissible ; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted." In America it has also been held that a decree cannot be set aside for fraud on the ground that the successful party bribed his witness to swear falsely. (See Black on Judgments, Vol. I, S. 323, Note 204 with regard to the bribing of witnesses to swear falsely).

In *Muhomed Golab* v. *Mahomed Sulliman* (17) Sir Comer Petheram, C. J., and Ghose, J., were of opinion that a decree could not be set aside for fraud on the ground that it was obtained by perjury committed by, or at the instance of, the other party. The learned Judges followed *Folwer* v. *Lloyd* (6). Petheram, C.J., observed : "Where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and that the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed, to the Court by which it was passed, but I am not aware that it has ever been suggested in any decided case, and, in my opinion, it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is, of course, fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but also of that which relates to *res judicata* as well." The reasons why this cannot be the case are very clearly stated by James, L. J., in the passage I have quoted." *Abouloff* v. *Oppenheimer and Company* (8) and *Vadala* v. *Lawes* (12) do not seem to have been brought to the notice of the learned Judges. But the case is valuable as indicating the correct principle of law to be applied in their opinion. This

(16) 2 Gray 361 =61 Am. Dec. 454.

(17) (1894) 21 Cal. 612.

decision has been followed in *Abdul Huque Chowdhree* v. *Abdul Hafiz* (18) and in *Moruful Huq* v. *Surendra Nath Roy* (19) though a different view was taken in *Lakshmi Charan Shaha* v. *Nur Ali* (20), *Venkatappa Naik* v. *Subba Naick* (21) deliberate perjury committed by the successful party was regarded by Boddam and Moore, JJ., as a ground on which the judgment might be set aside on the authority of *Abouloff* v. *Oppenheimer and Company* (8) and *Vedala* v. *Lawes* (12) *Baker* v. *Wadsworth* (13) was not brought to the notice of the Court. The correctness of the decision was questioned in *Kumaraswamy Chetty* v. *Kamakshi Ammal* (22) but the point did not arise for decision. There appears to be no decision of the Privy Council bearing on this question in *Khagendra Nath* v. *Pran Nath Roy* (23) the Judicial Committee held that where an *ex parte* decree is attached, not merely on the ground of irregularity or insufficiency of the service of summons but also on the ground that the plaintiff prevented the defendant from defending the suit by getting him declared a lunatic and forcing him by his threats to leave his home and stay elsewhere in secrecy, it could be set aside on the ground of fraud, but there no attempt was made to impeach the judgment on the ground of any fraud which formed the subject of prior adjudication by the court. In *Tika Ram* v. *Daulat Ram* (24), *Mahomed Golab* v. *Mahomed Sulliman* (17) was approved, though the case itself was one in which the only substantial complaint was taken to be that summons had not been properly served on him.

In this state of the authorities, if it were necessary to decide whether a judgment could be set aside for fraud on the ground that the successful party was guilty of deliberate perjury or suborning perjury we might have to consider whether it is desirable to refer the question to a Full Bench of the Court for an authoritative pronouncement. But, we do not think that it is necessary in the circumstances of this case to decide that broad question. In the first place, the fraud alleged in the plaint was that some items were wrongly debited in the defendant's account against the plaintiff. The judgment of the lower Court, on the other hand, is based on the fact that the defendant failed to prove that there was an agreement between him and the plaintiff, that the timber alleged by the defendant to have been sold to the plaintiff for Rs. 1,026-14-0 should be taken at the price for which they were sold by the defendant. *Secondly*, it can hardly be held that the lower Courts have found that the defendant was guilty of deliberate perjury in obtaining the judgment in Original Suit No. 16. They have, no doubt, held that the defendant failed to prove the agreement set up by him, considering the evidence addued for the purpose to be insufficient. But, this is considerably short of finding deliberate perjury on his part. As laid down in *Patch* v. *Ward* (2) what the Court has to find is "malicious and fraudulent design to mislead the Court." See also *Jagun Proshad* v. *Posun Sahoo* (25). *Abouloff* v. *Oppenheimer and Company* (8) does not lay down that the mere fact that the evidence as formerly believed is found on the strength of the evidence of other witnesses to be unacceptable is sufficient to set aside the judgment on the ground of fraud. *Thirdly* the power of the Court to set aside a judgment on the ground of fraud is a discretionary one [See *Baker* v. *Wadsworth* (13)]. Black. observes that to entitle a party to have a judgment vacated, he must show a sufficient reason why he did not assert and enforce his rights at the proper time and in the regular manner and that his whole conduct throughout has been free from fraud or any turpitude, and he must free himself from all imputation of laches for the judgment will not be disturbed if it appears to have been entertained as a result of his own heedlessness, sloth or lack of diligence in protecting his own interests. Here the assistant agent found that the plaintiff was absent at the hearing of Original Suit No. 16 without due cause. It would have been extremely undesirable to allow such a person to prove under the guise of an allegation of fraud, but the claim of the defendant was unsupportable and the finding of the Court wrong. We allow the petition and direct the

(18) (1910) 5 I. C. 648.
(19) (1912) 15 I. C. 893.
(20) (1911) 38 Cal. 936. 11 I. C. 626.
(21) (1906) 29 Mad. 179.
(22) (1912) 16 I. C. 843.
(23) (1902) 29 Cal. 395 ; 29 I. A. 99 P C.
(24) (1910) 32 All 145 ; 4 I. C. 596.
(25) 1904 8 C. W. N. 172.

agent to review his decree in the light of this judgment. The respondent will pay the petitioner's costs in this Court.

Petition allowed.

S. N./R. K.

A. I. R. 1916 Madras 373

SADASIVA AIYAR AND NAPIER, JJ.

A. Varadarajulu Chetty—Defendant—Appellant.

v.

A. Rajamma—Plaintiff—Respondent.

Original Side Appeal No. 33 of 1914, decided on 12th February, 1915, from the Judgment of Sankaran Nair, J., dated 2nd March, 1914.

(a) Executor—Rule of English Law that one executor cannot bring an action of *devastavit* against another does not apply in India.

Unlike in England, there are no forms of action within one of which every suit must be brought in Indian Courts and consequently the rule of English Common Law which forbids an action of *devastavit* being brought by one executor against another, has no application to India. [P. 373, C. 2.]

(b Executor—Management—In absence of direction in will money cannot be lent to an executor.

In the absence of any direction in the testator's Will, an executor is not entitled to lend money without security to another executor. [P. 373, C. 2.]

A. Krishnasami Iyer, for *K. Srinivasa Iyengar*, *Venkatasubba Rao* and *Radhakrishnayya*—for Appellant.

C. P. Ramaswami Iyer—for Respondent.

Facts.—By his last Will and testament one Purushothama Chetty appointed the plaintiff and the defendant and one Nalam Venkataratnam as his executrix and executors respectively, and appointed the plaintiff also as his legatee. The plaintiff and the defendant both joined in taking out Probate of the Will. The defendant mismanaged the property and lent a sum of Rs. 8,500 to Nalam Venkataratnam without any security whatever. The latter having become insolvent, the plaintiff sued the defendant for *devastavit*. His Lordship Mr. Justice Sankaran Nair, who heard the case sitting on the original side, held that the defendant was liable to account for the sum of Rs. 8,500 lent out to Nalam Venkataratnam and gave the necessary directions for the filing of accounts, etc. Against the said decision, defendant appealed to the High Court.

JUDGMENT.

Sadasiva Aiyar, J.—The appellant, 1st defendant, is one of the two executors who took out the Probate Exhibit A, and accepted the office of executor. The testator's name is Purushothama Chetty. The plaintiff is the other executor who took out Probate. A third executor, Nalam Venkataratnam, is an insolvent and it does not appear that he joined in the Probate. The learned trial Judge held the 1st defendant liable to account to the estate in respect of a sum of Rs. 8,500 (eight thousand five hundred rupees) which belonged to the estate and which he lent out to the third executor. The Judge directed the 1st defendant to file the necessary accounts and also gave the usual further directions. The first contention in appeal (if I understood it right) is that one executor cannot file an action at common law, according to English practice, against another executor, that the present action is an action of *devasta t*, which is a common law action and he..ce that this suit must be dismissed.

The short answer is that there are no forms of action within one of which every suit must be brought in Indian Courts and that the records show that this action was brought on behalf of the estate for establishing all necessary reliefs for the benefit of the estate.

Then it is contended that the 1st defendant was entitled to lend the money without security to Nalam Venkataratnam. A perusal of the testator's Will clearly shows that this contention also is untenable.

Lastly, it is argued that, in any event, the plaintiff is jointly liable with the 1st defendant, as she consented to the loan made to Nalam Venkataratnam. In the first place this is not stated as one of the grounds of appeal in the appeal memorandum, which only says that because the plaintiff was wrong-doer herself, she could not call upon the 1st defendant to answer. In the next place, the learned Judge says: "It is unnecessary for me to determine at *this stage* whether the plaintiff consented to it or not." I have, therefore, no doubt that the questions whether the plaintiff consented to the making of the loan to Nalam Venkataratnam, and if so, whether she is jointly liable with the 1st

defendant for the loss incurred by the estate or even whether she, as executor-legatee, is liable in a greater degree than the 1st defendant—all these questions were left to be decided in later stages of the suit, and we must presume that the final decree in the suit would have been passed after a consideration of these points.

I would, therefore, dismiss the present appeal with costs.

Napier, J.—I concur.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 374 (1)

AYLING AND HANNAY. JJ.

Secretary of State—Defendant—Appellant.

v.

Mikkelineni Chinna Venkata Subbayya and *others*—Plaintiffs—Respondents.

Second Appeal No. 1548 of 1913, decided on 30th October, 1914, from the decree of Tempy., Sub-Judge., Guntur, in Appeal Suit No. 57 of 1911.

Landlord and Tenant—Granting request of tenant to allow some portion of land to be used as cattle-shed and remitting the assessment on that land does extinguish the tenant's interest.

The plaintiffs petitioned Government to allow them to use 45 cents of *their own land free of assessment* for the purposes of a cattle-shed and a farm-house in connection with their adjoining lands. This request was granted and in the next *patta* 45 cents of land was included, although the assessment was deducted from the total amount payable:

Held, that the plaintiffs did not give up their interest in the land and place it at the absolute disposal of Government. 13 M. L. J. 269, dist.

[P. 374, C. 1 & 2.]

Govt. Pleader—for Government.

V. Ramadoss—for Respondent.

Judgment.—It is admitted that the suit land was the property of plaintiffs' family in 1857, and the lower Appellate Court has found that they did not then give up their interest in it and place it at the absolute disposal of Government. The Government Pleader argues that the lower Appellate Court has wrongly interpreted the facts and relies on *Kattai Mahammed Meera Mohideen* v. *Secretary of State for India* (1). The facts in that case are very different from those in the present case. In that case the *ryots* at the time of Settlement petitioned the Collector to remit the assessment on certain of their lands, in order that the land should be used for village house site. This was accordingly done and the lands were classified with the knowledge of the *ryots* in the Settlement Registers as village site *poromboke*, and it was held that the *ryot's* private rights in the lands were extinguished.

In the present case it appears that plaintiffs' family were much inconvenienced in their agricultural work by the fact that a canal had been newly excavated between their lands and the village. They accordingly petitioned Government to allow them to use 45 cents of their *own land free of assessment* for the purposes of a cattle-shed and a farm-house in connection with their other adjoining lands. This request was granted and in the next *patta*, Exhibit A, the 45 cents of land was included although the assessment, as it was, was deducted from the total amount payable.

There is, therefore, no analogy between the two cases: and the finding of the Subordinate Judge cannot be regarded as illegal.

The second appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) (1903) 13 M. L. J. 269.

A. I. R. 1916 Madras 374 (2)

Full Bench

WHITE, C. J., SANKARAN NAIR AND OLDFIELD, JJ.

Secretary of Commsr., of Salt, Abkari and *Separate Revenue, Madras*—Referring Officer.

v.

Mrs. E. W. Orr and *Bank of Madras*—Executant.

Referred Case No. 5 of 1913, decided on 24th October, 1913, Madras by Secretary of Commsr., of Salt, Abkari and Separate Revenue.

Stamp Act (2 of 1899), S. 2 (17), Sch. 1, Art. 40—Deed of declaration of trust of business and machinery, plants etc., in favour of Bank executed by debtor for advances received providing for new machinery being substituted as security and providing also for interest and insurance and providing debtor to hold possession in trust for bank, was held to be a mortgage deed for purpose of Stamp Act and not deed of hypothecation.

In consideration of advances to be made by a Bank, the debtor, in addition to a pro-note executed by a third person, executed a declaration of trust of his specified business property, machinery, plants etc., which was declared to be held by the debtor himself on trust for and on behalf of the Bank. The instrument provided that the trustee shall have full power to use and employ the trust property in certain ways and to re-place and make good such portions of the trust property as might be sold or otherwise dealt with and that the substituted goods should be included in the security. There was a provision as regards interest, and also for insurance ;

There was a further declaration that the trustee stood possessed of the net profits of the business realised after payment of all expenses including a sum not exceeding Rs. 20,000 to be retained by the trustee annually in trust to pay and apply the same in payment of sums advanced by the Bank :

Held, (1) that the instrument was a mortgage-deed for the purposes of the Stamp Act ;

[P. 376, C. 2.]

(2) that it was not a letter of hypothecation within the meaning of the 2nd exemption to Article 40 of the 1st Schedule to the Act.

[P. 376, C. 2.]

Govt. Pleader—for Referring Officer.

W. Barton—for Executant.

White, C. J.—The question we have to consider is whether the instrument which has been submitted to us is a mortgage-deed within the meaning of S. 2 (17) of the Indian Stamp Act (II of 1899). If so, it is chargeable with stamp duty as such under Article 40 of the 1st Schedule to the Act. Mr. Barton has argued that the instrument in question is a declaration of trust and that it is chargeable as such under Article 64. At the conclusion of his argument, he suggested that the instrument might be construed as a letter of hypothecation accompanying a Bill of Exchange and, therefore, fell under the 2nd exemption to Article 40.

A mortgage-deed is defined for the purposes of the Stamp Act, and for the purposes of that Act only, as including "every instrument whereby, for the purpose of securing money advanced, or to be advanced by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates to, or in favour of, another, a right over or in respect of specified property." The definition is almost as wide as the definition of a bill of sale in the English Bills of Sale Act.

What are the material provisions of this deed? It is an instrument to which the parties are one Mrs. Orr and the Bank of Madras. It recites that Probate of the Will of the late Mr. E. W. Orr was granted to Mrs. Orr as sole executrix thereof, that the late Mr. Orr was the sole proprietor of a certain gold and silversmith's business, that Mrs. Orr, in order that certain creditors of the firm may be re-paid their loans and with a view to certain other matters, has entered into an agreement with the Bank of Madras by which the Bank has agreed to advance to Mrs. Orr a certain amount on a promissory-note to be executed by one Thomas William Barton in favour of the firm (Messrs. P. Orr and Sons) and endorsed by them to the Bank of Madras upon the said Mrs. Orr executing a declaration of trust of the machinery, plant, stock-in-trade, goods, chattels and effects in connection with the business more particularly described in the schedule to the instrument. In consideration of advances to be made by the Bank, Mrs. Orr declares that she holds the said machinery, plant, stock-in-trade and etc., on trust for and on behalf of the Bank. There is a provision as regards interest. There is then a provision that the trustee shall have full power to use and employ the trust property in certain ways and to re-place and make good such portions of the trust property as may be sold or otherwise dealt with and that the substituted goods shall be included in the security ; there is a provision for insurance. Then there is a declaration that the trustee stands possession of the net profits, realized after payment of all expenses including the retention by the trustee of a sum not exceeding Rs. 20,000 annually, in trust to pay and apply the same in payment of sums advanced by the Bank. (The reference in the letter of the Board of Revenue to this part of the instrument is not quite accurate).

These are the covenants to which I need refer. In the schedule, we have the headings "machinery, plant, fixtures and furniture in Madras and Rangoon" and "stock-in-trade, goods, chattels and effects in Madras and Rangoon." Under these headings are set out the various classes of articles with their respective values. By the instrument Mrs. Orr creates a trust, declares that she is the trustee and that certain property shall be trust property. She constitutes the Bank of Madras *cestui que trust* in respect of the trust property. That is the object and

purport of the deed. Whatever the precise rights of the *cestui que trust* may be, it is not for us to consider. But it seems to me anomalous for a party who sets up a case to say that the trust does not give a beneficial interest to the *cestui que trust*, or that the *cestui que trust* has not, in the language of S. 2 (17), any right in respect of the trust property. That is really what Mr. Barton's argument comes to. It seems to me that there are two trusts created by the deed. Mr. Barton has agreed that there is a trust in respect of the net profits in paragraph 5 of the deed, but that there is also a trust in express language in paragraph No. 1 in respect of the machinery, plant, stock-in-trade goods, chattels and effects in or upon the business premises of the firm.

It has been suggested that the definition is not satisfied because the trust property is not specified and could not be specified since the trust property consists of the net profits. We have been referred to a Full Bench decision of this Court which is reported as *Reference under Stamp Act S.* 46 (1). In that case, there was an agreement between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trust declared in the agreement. It was held that it was liable to stamp duty as a declaration of trust and it was also held that the fund intended to be created under the agreement was not "specified property." In that case, the learned Judges had to consider whether a certain sum of money which was to be accumulated by certain parties who were willing to contribute money for certain purposes was "specified property." It may be that the net profits here are not specified property within the meaning of the definition. But we have a trust declared by the instrument in respect of the machinery, plant, stock-in-trade etc. With regard to them, we have the schedule to which I have referred. It seems to me that so far as the stock-in-trade which are described in the deed as trust property are concerned, the trust property is specified. It is perfectly clear that the object of the instrument was to give the Bank some rights by way of security. They had their contractual rights on the promissory-note. They wanted something more and I see no reason for holding that the deed does not to some extent—to what extent it is unnecessary for us to consider—carry out the object which was in the minds of the parties when the deed was prepared.

I need scarcely say that the fact that the instrument is a trust-deed does not make it the less a mortgage. It is, in my opinion, a mortgage deed for the purposes of the Stamp Act, because it creates a right in respect of specified property for the purpose of securing money advanced or to be advanced.

I can deal shortly with Mr. Barton's second point. Hypothecation is not defined in the Stamp Act nor in the Transfer of Property Act either. Assuming that this instrument is a Bill of Exchange within the meaning of the definition in Stamp Act, it seems to me it is not a letter of hypothecation within the meaning of the exemption. According to Mr. Barton, the instrument is a formal declaration of trust. I do not think a formal declaration of trust can be treated as a letter of hypothecation within the meaning of the exemption. I quite agree that a fiscal enactment should be construed strictly and in favour of the subject, but it seems to me that whatever else the instrument may be, it is a mortgage-deed within the meaning of the definition in S. 2 (17) of the Stamp Act.

Sankaran Nair, J.—I agree.

Oldfield, J.—I agree.

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(1) (1888) 11 Mad. 216.

A. I. R. 1916 Madras 376.

OLDFIELD AND SADASIVA AIYAR, JJ.

Munjuluri Sivaramayya—Appellant.

v.

Singumahanti Bujanga Rao and *another*—Respondents.

Appeal No. 155 of 1914, decided on 28th July, 1915 against the order of Dist., Judge, Godavari, in Insol. Appeal No. 551 of 1913.

(a) Provincial Insolvency Act (3 of 1907,) S. 16 (4) Official Receiver when property of insolvent is vested in him becomes necessary party—Order will not bind him—Mistake cannot be rectified, by adding him party in appeal.

An Official Receiver is a necessary party to any proceedings affecting the insolvent's estate when once it has become vested in him under S. 16 (2) (a). Any order affecting the estate in his absence is clearly illegal. Proceedings so instituted

cannot be rectified by impleading him subsequently in an Appellate Court. [P. 377, C. 2.]

(b) Letters Patent (Madras), S. 15—Appeal against illegal order affecting insolvent's estate even if time barred can be treated as revision.

An appeal against an order affecting the estate of an insolvent even if presented out of time can be treated as a revision-petition and a High Court can interfere with such an order under S. 15 of the Charter Act if it is clearly illegal and interference is necessary in the interests of justice. 18 All. 4, Foll. [P. 378, C. 1.]

(c) Limitation Act (9 of 1908), Ss. 5 and 12 (2)—Ss. 5 and 12 do not apply to appeals against orders under Provincial Insolvency Act. (1907) Ss. 46 (4) (Per Oldfield, J., Sadasiva Aiyar, J., dissenting.)

Per *Oldfield, J.* - In regard to the applicability of Ss. 5 and 12 (2), Limitation Act to the orders passed under S. 46 (4), Provincial Insolvency Act, there is no reason for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act and the time taken in obtaining copies of judgment cannot be deducted in favour of an appellant. 34 Mad. 505; (F. B.), Foll., (34) All. 496; diss. from. [P. 377, C. 2.]

Per *Sadasiva Aiyar, J.* (dissenting)—The power to execuse delay in the presentation of an appeal under S. 5 of the Limitation Act, can also be exercised in regard to appeals presented beyond period of limitation prescribed by a special or local law; in the cases which hold otherwise, the question did not distinctly arise for decision. 8 Cal. 910; 10 Mad. 210; 12 Mad. 1, diss. from. 18 Mad. 99; 20 Mad. 249, Foll. [P. 378, C. 2.]

B. Narasimha Rao—for Appellant.

P. Chenchiah—for Respondents.

Oldfield, J.—The appellant is 10th creditor of a person, who has been adjudicated insolvent by the District Judge of Godaveri, and, besides being an unsecured creditor, has, according to his counter-affidavit filed in the lower Court, a mortgage on part of the property now in question. The petitioner in the lower Court, here respondent, is another creditor, who alleged in his petition, Insolvency Appeal No. 551 of 1913, that he held an agreement, executed by the insolvent, his son, to transfer the property to him in discharge of his debt, that he had once prayed for execution of a document by the Court or Official Receiver, in whom the assets had vested, that, receiving no orders, he had later asked for leave to sue, and that, again receiving no orders, he finally asked for a direction to the Official Receiver to execute the document. Respondent made the defendant alone a party to his petition and appellant says in his counter affidavit that he appeared to oppose it after hearing of it merely by chance. The lower Court passed the order under appeal, directing the Official Receiver to execute a transfer as prayed. It also in the same order allowed a claim by respondent to two items as his own and not the insolvent's property.

One defect in this order is that it makes no reference to the important contentions of appellant, *inter alia*, that the agreement in question could not prevail against his mortgage for want of registration and was unenforceable owing to lapse of time and that the claim to two items, which does not appear to have been made in the petition under disposal, had already been negatived by the Court after inquiry. But the proceedings were subject to the more fundamental objection, that, though the insolvent's assets had vested in the Official Receiver under S. 16 (2) (*a*), Provincial Insolvency Act, the lower Court dealt with them by its order in the absence of that officer and without hearing his objections. We are astonished that this mistake should have been made and we cannot regard it as rectified by the impleading of the Official Receiver in this Court. The result is that the lower Court has passed an order irregular in a material respect and of no legal effect, since the person directly concerned has had no opportunity to oppose it.

It is, however, argued that no interference with this result is possible, because this appeal is out of time, inasmuch as S. 46 (4), Provincial Insolvency Act, contains nothing authorising an appellant to deduct time spent in obtaining copies from the period of limitation it fixes, and the Provincial Insolvency Act being a special law within the purview of S. 29 (1) (*b*) of the Limitation Act, S. 12 (2) of the latter enactment is also inapplicable; and it is further contended that S. 5 of the Limitation Act, is inapplicable for similar reasons and that we, therefore, cannot take the course, which my learned brother proposes and excuse the delay. On the first point I should follow *Abu Baker Sahib* v. *Secretary of State for India* (1), in preference to *Dropadi* v. *Hira Lal* (2), holding that valid ground for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act has not been shown and decided

(1) (1911) 34 Mad. 505=5 I. C. 884 (F. B.)
(2) (1912) 34 All. 496; 16 I. C. 149.

that the appeal is out of time. On the second point I should not be prepared to dissent from my learned brother's proposal to give weight to the circumstances of the case and the novelty of this objection and excuse the delay, if it were clear that it could legally be excused, and, if the matter were *res integra*. I should be inclined to the view taken in *Nijabutoolla* v. *Wazir Ali* (3). *Reference under Forest Act V of* 1882 (4) and *Seshama* v. *Sankara* (5), that the general provisions of the Limitation Act, including S. 5, are applicable, inasmuch as they do not alter or affect any period of limitation within the meaning of S. 29 (1) (*b*). Later decisions however of this Court, *Veeramma* v. *Abbiah* (6) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (7), are to the contrary effect, and it would be necessary either to follow them or refer the matter to a Full Bench for authoritative decision.

My learned brother, however, agrees with me that in the exceptional circumstances of this case, an alternative course is open to us, which we propose to take, to treat the appeal as a revision petition and deal with it as such, under S. 15 of the Charter Act. Those exceptional circumstances consist in the clear illegality of the lower Court's action, the fact that its order may, if acted on, prejudice the creditors as a body, though it cannot really bind them or the Official Receiver, who represents them. There is the further circumstance that, if interference is delayed, respondent might alienate the property and irreparable loss might result. *Abdulla* v. *Salaru* (8) is a precedent for interference with an appealable decision. In these circumstances we revise the lower Court's order by setting it aside and directing that the petition before it be re-heard after the Official Receiver has been made a party, and be disposed of with reference to all of his and appellant's contentions. There will be no order as to costs in this Court. Costs to date in the lower Court will be provided for in the order it eventually passes.

(3) (1882) 8 Cal. 910.
(4) (1887) 10 Mad. 210.
(5) (1889) 12 Mad. 1.
(6) (1895) 18 Mad. 99.
(7) (1897) 20 Mad. 249.
(8) (1896) 18 All. 4.

Sadasiva Aiyar, J.—I entirely agree that the District Judge's order has to be set aside for the reasons given by my learned brother, so I concur in the order passed by him under S. 15 of the Charter Act.

On the question whether S. 5 of the Limitation Act gives this Court the power to execuse the delay in the presentation of this appeal, I agree with the decisions of *Nijabutoolla* v. *Wazir Ali* (3); *Reference under Forest Act* (4) and *Seshama* v. *Sankara* (5), which answer that question in the affirmative. The case of *Veeramma* v. *Abbiah* (6) was not concerned with the power of the Court to execuse delay under S. 5 but with the provisions of S. 7 of the old Limitation Act (present S. 6), the application of which provisions would have "affected" and "altered," the period of limitation provided by a special Statute by excluding the interval during which the plaintiff was under disability and thus by lengthening the period. The decision in *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthy* (7) no doubt, interprets the reasoning in *Veeramma* v. *Abbiah* (6), as involving the conclusion that S. 5 of the Limitation Act is also inapplicable to a case governed by a special Statute. With the greatest respect I feel inclined to doubt if the reasoning of all the three Judges who decided the case of *Veeramma* v. *Abbiah* 6), really leads to that conclusion, though some of the observations in the judgment of one of the learned Judge's (Shepherd, J.,) might so point. I respectfully dissent from the decision of *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthy* (7), the learned Judges who decided that case themselves conceding that the argument urged before them in favour of the applicability of S. 5 appeared "to have considerable force."

S.N./R.K.

Appeal allowed; *Petition remanded.*

A. I. R. 1916 Madras 378

OLDFIELD AND TYABJI, JJ.

Aiyarappa Mudaliar—Defendant—Petitioner.

v.

Kajarat Ikbulai Syed Gulam Ghouse Sahib Kadiri Avergal—Plaintiff—Respondent.

Civil Revn. Petn. No. 582 of 1913, decided on 7th October, 1914, against the

order of Dist. Judge, Tanjore, in Civil Misc. Appeal No. 30 of 1911.

Madras Estates Land Act (1 of 1908), S. 195—Order of revenue Court granting review is not appealable in District Court.

No appeal lies to the District Court against the order of a Revenue Court granting a review in a summary suit. A. I. R. 1915 Cal. 283 and 18 I. C. 549, Foll. [P, 379, C. I.]

S. Muthia Mudaliar—for Petitioner.

T. V. Gopalasami Mudaliar—for Respondent.

Facts.—The suit was by a landlord against his tenant for rent. The main contention of the defendant was that the suit was barred by limitation. The Revenue Divisonal Officer of Kumbakonam, who heard the case, upheld the plea of the defendant and dismissed the suit. The plaintiff thereupon applied for a review of this order on the ground that it was opposed to a decision of the High Court. The review applied for was granted. Against this order granting review, the defendant appealed to the District Judge who held that there was no appeal. The defendant thereupon preferred this civil revision petition to the High Court.

JUDGMENT.

Oldfield, J.—I agree with the learned District Judge that no appeal lay, the authorities in point being *Hari Charan Saha* v. *Baran Khan* (1) and *Oravukundiyil Parkum Elavana Tolan* v. *Palankundy Kunhi Kutti* (2).

The principle required was, moreover, stated also in an unreported decision of this Court in Civil Miscellaneous Appeal No. 195 of 1910. The civil revision petition is dismissed with costs.

Tyabji, J.—The cases cited by my learned brother are binding on us and we must follow them.

Had the matter been *res integra*, I should have been inclined to hold that the authorities above cited read into O. 43, R. 1 (*w*), of the Code of Civil Procedure words to the following effect: "Provided that no appeal shall lie from such an order except on the grounds referred to in O. 47, R. 7 (1)."

The three grounds mentioned in O. 47, R. 7, seem to me to be such as might to taken *in limine*. They refer to:

(*a*) the identity of the Judge;

(*b*) notice, or strict proof of the fact that the new matter was not within the applicant's knowledge;

(*c*) limitation.

With regard to these three objections the rule, in my opinion, permits two methods (or occasions) for taking them, *viz.*,—

(1) at once by way of a special appeal from the *order* of review;

(2) at the hearing of the appeal from the final *decree* passed after the review.

That two methods or occasions are provided for these specified objections does not, in my opinion, derogate from the unrestricted right of appeal granted by O. 43, R. 1 (*w*), from all orders. Clause (*w*) does not contain any restriction as to the grounds on which the granting of the review application may be attacked in appeal.

The fact that these three objections might be taken at the final hearing as well as the special appeal (*i.e.*, on both the occasions above referred to) does not imply that no other objections might be taken at the special appeal, to which O. 43, R. 1 (*w*), refers, without any restriction; according to the interpretation above referred to, both provisions of the Code of Civil Procedure, *viz.*, those in O. 43, R. 1 (*w*), and O. 47, R. 7 (1), would be given effect to and I should have preferred this interpretation had I not felt concluded by authority. As it is, following the cases cited by my learned brother, the petition must be dismissed with costs.

S. N./R. K.

Petition dismissed.

(1) A. I. R. 1915 Cal. 283=25 I. C. 903=41 Cal. 746.

(2) (1913) 18 I. C. 549.

A. I. R. 1916 Madras 379

AYLING AND TYABJI, JJ.

Mahomed Sahib—Defendant—Appellant.

v.

Syed Sahib and *others*—Plaintiffs—Respondents.

Second Appeal No. 423 of 1914 decided on 15th February 1915, against the decree of Sub-Judge, Negapatam, in Appeal Suit No. 320 of 1911.

(a) Civil P. C. (15 of 1908), S. 9—Suit for right to perform certain duties attached to alleged hereditary office but not relating to religious office held not of civil nature.

A suit for the possession of an alleged hereditary office, the functions appurtenant to which are the digging up and burying up a pot, distributing *sherbet*, collecting money and distributing a small portion of the collection and reciting portions of the Koran is not maintainable as it is not for a religious office and a claim in regard thereto is not a suit of a civil nature cognisable by a Civil Court. [P. 380, C. 1 & P. 381, C. 1 & 2]

(b) Mahomedan Law—Religious Office—Religious office is one to which certain functions enjoined by religion are attached.

A religious office as known to Muhammadan Law must in its nature be for the performance of certain funtions which are recognised by the Muhammadan Law as necessary or at any rate as proper to be performed in connection with the religion of Islam. [P. 380, C. 2.]

R. Vembu Aiyar for *R. Kuppusami Aiyar*—for Appellant.

K. N. Aiya and *S. Satyamurthi*—for Respondents.

Tyabji, J.—This appeal arises out of a suit in which the plaintiffs claim possession and an injunction restraining disturbance of what is alleged to be a hereditary office. Particulars of the functions of this alleged office are given in paragraph 1 of the plaint. The plaintiffs have obtained a decree as prayed from the lower Appellate Court.

The only question on which we heard arguments in this Court was whether a suit on the cause of action alleged in the plaint could be considered to be a suit of a civil nature within S. 9 of the Code of Civil Procedure. It was argued before us that there was a contest between the parties as to the right to a religious office and that, therefore, the suit fell within the explanation to S. 9 and must be considered to be a suit of a civil nature cognizable by the Civil Courts.

The parties are Mussalmans and it is admitted that the Muhammadan Law is applicable.

The initial difficulty in the way of the plaintiffs against which the learned Pleader who appeared for them struggled very hard, was that the functions referred to in paragraph 1 of the plaint are not functions which the Muhammadan Law recognises as forming part of the duty of a person holding any of those offices which are known to that law; as for instance of *qazi*, *muezzin* or *pesh-imam*. I do not attempt to enumerate all the offices that are known to the Muhammadan Law. Other offices that are religious in their nature must, I apprehend, be for the performance of certain functions which are similarly recognised by Muhammadan Law as necessary or, at any rate, as proper to be performed, in connection with the religion of Islam. The existence of an office involves the existence of some duties to be performed by the holder of the office. The religious texts of every sect of Islam are embodied in well-recognised and authoritative texts which contain particulars of the religious duties recognised in Islam. When, therefore, the question is whether any alleged religious office is known to Muhammadan Law, there ought to be no difficulty in ascertaining whether the alleged functions of the office form part of the religious life of a Muhammadan, whether the performance of the acts in question is made a duty or at least recognised as a proper and usual act by Muhammadan Law, and whether any person is required or expected to perform those functions in his capacity as the holder of an office. Thus the duties of the *muezzin* to call to prayers, of a *pesh-imam* to lead at prayers, of a *qazi* originally to adjudicate upon disputes but now mainly to officiate at marriages and keep a record of divorces—these are functions which find a recognised place in the religious life of a Musalman. Nobody challenges that calling to prayers and leading at prayers are functions recognized by Islam as proper to be performed, and as forming part of the duties of the *muezzin* and the *pesh-imam*. Any such challenge could be answered without any difficulty by referring to the texts.

No attempt has been made in the present case to establish that the functions referred to in paragraph 1 of the plaint —I speak of them as functions though I do not know whether they ought to be dignified with that term—have any recognition in the religious system of Islam. There was no citation from the Hidaya or the Fatawa Alamgiri or from any of the numerous books on Muhammadan Law based on those authorities, and recognized by the decisions of the Courts. I do not restrict myself to these two texts: I mentioned them merely as examples of the class of books that might have been referred to; and I mention them as they are available in English translations.

The functions referred to in paragraph 1 of the plaint (which consist of about twenty different acts described in great detail) may be classified under three or four heads; such as digging up and burying a pot, distributing *sherbet*, collecting money and distributing a small portion of the collections and reciting portions of the Quran. The last is evidently thrown in order to give to the whole proceeding the garb of religious rituals.

As I have already said, not the slightest attempt has been made—and I think that any attempt, if it had been made, would have been entirely unsuccessful—to show that these functions are recognized as religious rites of Islam in the sense that they have any religious significance.

If any person, therefore, chooses to do these acts, there may be nothing to prevent him from doing them, or to prevent others from participating in these acts, or thinking that they derive benefit therefrom and desiring them to be done; and it may be that the acts have been done for a long time. But the existence of these circumstances does not make the doing of the acts such a duty in Muhammadan Law as is connoted in the expression "office."

It was argued that these acts were done in a mosque and during Muharram and that, therefore, they became invested with some religious aspect. I am not now considering the propriety of the conduct of the *mutwalli* of the mosque in allowing such acts to be done in the precincts of the mosque. Assuming that the acts are harmless or even meritorious and that there is no breach of trust on the part of the *mutwalli* of the mosque in allowing them to be done in the mosque, that is not enough to create an office.

A number of decisions were cited to us which seem to me to be inapplicable for several reasons, to two of which I may refer.

Some of the decisions cited have reference to the question whether property dedicated for particular purposes or objects can be considered to be properly or validly dedicated by way of *waqf*, and whether its administration can, therefore, be supervised in the manner in which the administration of *waqf* property is supervised by the Court. The present suit, from what I have already said, appears to be entirely different from such a suit.

Other decisions cited to us are not applicable as they are decisions under the Hindu Law. A great number of offices connected with temples are no doubt recognized in Hindu Law. They exist for the due performance of religious ceremonies, or recitation of *mantrams*, or other functions recognized by the Court as being attached to offices under Hindu Law. In this case the functions which are alleged to be performed by the office-holder are, as I have already said, so far as I can see, quite, foreign to Islam. There is no warrant for holding that Islam requires these acts to be done, or that the doing of them is considered meritorious or efficacious in any religious or legal sense.

It has been argued that on the facts before us, on which both the lower Courts would appear to have given their decision, we must assume that these functions have been performed for a great number of years, and that the presumption must be in favour of such performance being proper. But even so, the performance of the functions would not thereby become the fulfilment of the duties of an office. Not every thing that a person chooses to do, albeit for a long time, not everything that other people have permitted him to do or encouraged him in doing, would necessarily constitute the functions of an office. As a necessary part of that which is connoted in the term 'office' the existence of something which may be described as the duties of the person holding the office is absent. I need not consider whether there is anything to show in what manner the person purporting to be entitled to perform the functions has been entitled to hold the office, anything to indicate the persons to whom he owes the duty of performing the functions or the persons who will be entitled to superintend or supervise the due performance of those functions. In the present case, I have not the slightest hesitation in saying that the particulars referred to in the plaint cannot be said to be duties appurtenant to an office, and that is fatal to the existence of an office.

With reference to the suggestion that we should call for a finding on the issue whether there is such an office as is referred to in the plaint, that is not a question which can be decided by any evidence. Assuming all the allegations in the plaint to be true the question is one of law, whether a person who purports to perform the acts referred to in the plaint and who says he has been doing them for a number of years in the past can be said to hold any office. That question must be decided on the bases which I have endeavoured to explain.

In my opinion, therefore, the appeal must be allowed and the plaintiff's suit dismissed; but inasmuch as this point was not taken by the appellant either in this Court or in the lower Courts, the parties will bear their own costs throughout,

Ayling, J.—I agree.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 382

SANKARAN NAIR AND TYABJI, JJ.

Sundaramma—Plaintiff—Appellant.

v.

Kamakotiah and *another*—Defendants—Respondents.

Second Appeal No. 855 of 1912, decided on 27th August, 1914, against the decree of Sub-Judge, North Arcot, in Appeal No. 185 of 1911.

Hindu Law—Partition—Presumption—Presumption is about complete partition—There is no presumption that co-parcenary right is retained in some property.

When there is a partition in a joint Hindu family, the presumption is that it is a complete partition in status and of all the properties. If certain properties were left undivided, there is no presumption that the co-parcenary right is retained in those properties, 18 Bom 611; 32 Mad. 191, Foll. [P. 383, C. 2.]

L. A. Govindaraghava Aiyar and *R. Rangasami Aiyangar*—for Appellant.

C. S. Venkatachariar—for Respondents.

Judgment.—The District Munsif should have decided whether the partition list tendered was admissible in evidence or not. He is directed to return a finding whether this document is admissible. He may receive fresh evidence on this question.

The finding will be submitted within six weeks from this date, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Munsif of Chittoor submitted the following

Finding.—The case has been remanded by the High Court for a finding on the following question:—

Whether the partition list tendered is admissible in evidence.

2. The partition deed is badly torn. A translation thereof is printed at pages 13 to 20 of the printed papers (documents). It appears from the list that the partition was commenced on 25th July 1871 and that it was completed on 17th August 1871. The last paragraph at page 20 shows that the document is a partition deed, though it is signed only by three of the four members of the family and a share is allotted to Subbayyar's son, Munisami Iyer, who has not signed the document.

3. The plaintiff has further examined the plaintiff's sixth witness, Viraraghava Aiyar, mainly to show that the family had no other land in Chinna Thottalam, that it was *punja* land at the time of division and that the land was included in the document now in question. The witness says that he signed the list but this does not seem to be correct. No other oral evidence has been adduced.

4. The document in question is governed by Article 39 of the General Stamp Act XVIII of 1869 and is subject to a stamp duty of Rs. 16 and a penalty of Rs. 160-0-0. It is not clear why the Deputy Collector, to whom the document was sent impounded, has not collected the stamp duty leviable thereon and such penalty as he may think fit to levy. It has been argued that the partition was completed before the lists were prepared and that the lists need not, therefore, be stamped, relying on the case reported as *Nihal Chand* v. *David Sasson & Co.* (1). But the document is clearly a partition deed and further, the lists were drawn up in the present case on the dates on which the properties were divided.

5. Further, the document requires registration under S. 17 of the Indian

(1) (1912) 15 I. C. 28.

Registration Act VIII of 1871 ; for, from Exhibits D, E, F, G and H filed in the suit, it is clear that the value of each share exceeded Rs. 100. I find, therefore, that the document is not admissible in evidence as it has not been registered.

This second appeal and Civil Miscellaneous Petition No. 2594 of 1912 coming on for hearing on the 12th January 1914, after the receipt of the above finding, the Court made the following.

Order.—The partition deed which we mark for identification (M) is not inadmissible for want of registration, Act II of 1884. It is admissible in evidence on payment of penalty, which the appellant undertakes to pay if the Subordinate Judge finds the document genuine and requires to be stamped. If it is admitted, then the finding that if Ramiah was in possession it was the possession of a co-parcener on behalf of himself and defendants Nos. 3 and 4, cannot be supported. We will, therefore, direct the Subordinate Judge to submit a revised finding on the question whether the plaintiff's husband had been in possession for the statutory period and whether he had acquired title by such possession, after receiving the document in evidence, if genuine, and on payment of the penalty if required. Fresh evidence may be received.

The finding should be submitted within six weeks from the date of this order, and seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge of North Arcot submitted the following.

Finding.— * * *
So, there had not been adverse possession on plaintiff's husband's part in my opinion, *i. e.*, possession adverse to defendants Nos. 3 and 4, for the statutory period for him to have acquired a valid title thereby. I accordingly find the point in the negative.

This second appeal coming on again for hearing after receipt of the above finding, the Court delivered the following.

Judgment.—We accept the finding that the plaintiff's husband Ramayya did not acquire the property by exclusive possession.

It is argued by the appellant's Pleader that the plaintiff is entitled to a decree for joint possession to the extent of her deceased husband's interest in the property. Mr. Venkatachari contends that, as the property was left joint property when the rest of the properties were divided, the husband's interest survived to the respondents by survivorship, and he relies upon *Gavrishankar Parabhuram* v. *Atmaram Rajarm* (2). When there is a partition, the presumption is that it is a complete partition in status and of all the properties. If certain properties were left undivided, there is no presumption that the co-parcenary right is retained in those properties. See *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (3). Moreover in this case the Judge finds that there was a division in interest and the husband and his brothers were co-owners, though in another place he casually refers to one of them as a co-parcener.

We, therefore, declare that the plaintiff is entitled to the interest in the property to which her husband was entitled and decree that she be restored to joint possession. The parties will bear their own costs in this Court.

S. N./R. K.

Appeal allowed.

(2) (1894) 18 Bom. 611.
(3) (1909) 32 Mad. 191 ; 1 I. C. 408.

A. I. R. 1916 Madras 383

AYLING AND TYABJI, JJ.

Musalium Veetil Theyathil Mahammadunni —Defendant—Appellant.

v.

Kudumpalath Padinhara Parambil Bava and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 397 of 1914, decided on 9th February, 1915, against the decree of Dist. Judge, South Malabar, in A. S. No. 206 of 1913.

Transfer of Property Act (4 of 1882), Ss. 83 and 84—Actual deposit and not mere application to deposit stops interest.

It is only the actual payment of the full mortgage amount into Court that makes interest on the mortgage amount cease to run under S. 84 and not a mere presentation of a petition for that purpose under S. 83 of the Act.

[P. 384, C. 1.]

C. V. Ananthakrishna Iyer—for Appellant.

K. P. M. Menon—for Respondents.

Judgment.—The parties have been litigating for a very small amount, unless (as seems probable from the District Munsif's judgment) the real question at issue between them was not that which is argued before us, but whether the one side or the other was entitled to the documents referred to in the third issue.

Before us the only argument has had reference to the question whether the respondent had validly deposited under S. 83 of the Transfer of Property Act the amount of the mortgage due to the appellant. The learned District Judge has held that there was a valid deposit. We find, however, that the respondent put in a petition for deposit on the third of August 1910, and yet the sum was not deposited till the 10th of August and on that day he brought into Court only the sum due as on the 3rd of August. This was clearly not the proper amount, and his deposit was consequently not valid and technically the deposit cannot prevail so as to stop interest running under S. 84 of the Transfer of Property Act. We must, therefore, vary the decree under appeal by allowing interest till redemption, for which we extend the time to three months from this date.

Both sides have been in the wrong as to their attitude in the lower Courts, and neither has made any effort at meeting and minimising the question at issue between them. We think the proper order as to costs will, therefore, be that the lower Appellate Court's order for costs stand and to make them bear their own costs in this Court. We order accordingly.

The memorandum of objections is dismissed without costs.

S. N./R. K.

Appeal partly allowed; *Decree modified.*

A. I. R. 1916 Madras 384

SESHAGIRI AIYAR, J.

Shanmuga Othuvar—Petitioner.

v.

S. Veeravaghu Pillai—Respondent.

Civil Rev. Pet. No. 919 of 1913, decided on 28th January 1915, against the order of Dist. Judge, Tinnevelly in Original Pet. No. 155 of 1913; dated 18th October 1913.

(a) Religious Endowments Act (20 of 1863), S. 18—S. 18 confers very wide powers on District Judge—His discretion cannot be lightly interfered with—Costs of sanction petition would ordinarily be allowed if it is *bona fide*.

S. 18 gives a very wide discretion to the District Judge in regard to matters coming under the section and the mere fact that some serious allegations contained in the petition for sanction had not been considered by the Judge and the possibility of the Judge sitting in revision coming to a different conclusion, are not sufficient reasons for interfering with the order of the District Judge in revision. [P. 384, C. 2.]

In the absence of anything to show that the charges were unfounded and the petitioner acted negligently or inconsiderately, with a view to annoy or harass, and not prudently and *bona fide*, in applying for the sanction, the petitioner will be entitled to be paid his costs out of the trust property. [P. 384, C. 2 & P. 385, C. 1.]

(b) Civil P. C. (5 of 1908), S. 115—Discretion.

A mere failure to exercise a judicial discretion will not justify interference under S. 115. [P. 385, C. 1.]

C. S. Venkatachariar—for Petitioner.

S. V. Padmanabha Iyengar—for Respondent.

Judgment.—Mr. Venkatachariar complains that many serious allegations contained in his client's application for sanction have not been considered by the District Judge. I cannot say that that is a ground which would entitle me to set aside the order of the District Judge. S. 18 of the Religious Endowments Act gives him wide discretion in regard to such matters and although if I had been hearing the petition myself, I may not have come to the same conclusion, that is not a reason for my setting aside the order passed by the District Judge.

On the question of costs, which the District Judge has directed the petitioner to pay to the trustee complained against, I find that at least there are two grounds which would have justified the petitioner in moving the District Judge, and although the explanation in respect of items (*c*) and (*f*) was regarded by him as satisfactory to the extent of refusing sanction, he failed to note that they were not unfounded and that the petitioner did not act negligently or inconsiderately in praying for a sanction. It would discourage honest men from coming forward to move on behalf of a trust if, when they have done all that is necessary to bring certain matters before the Court, and it is apparent that they acted prudently and *bona fide* and not with a view to harass or

annoy, they should be compelled to pay the costs of the trustee who has given cause for complaint. I am of opinion that the District Judg's order as to costs is wrong. However, I do not think that under S. 115 of the Code, I can interfere with a bare failure to exercise a judicial discretion. I must, therefore, dismiss the petition, but under the circumstances mentioned by me, each party will bear his own costs in this Court.

S. N./R. K.

Petition dismissed.

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SANKARAN NAIR AND OLDFIELD, JJ.

Venkata Perumal Raz Bahadur Varu—Plaintiff—Appellant.

v.

Velayuda Reddi and *others*—Defendants—Respondents.

Second Appeal No. 233 of 1913, decided on 17th March, 1915, against the decree of Sub.-Judge, North Arcot, in O. S. No. 30 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 54—Contract of sale does not create any charge and does not affect purchaser without notice.

Under S. 54 of the Transfer of Property Act a contract for the sale of immoveable property does not by itself create any interest in the property. It does not run with the land and is not binding upon a purchaser without notice.

[P. 385, C. 2 & P. 386, C. 1.]

(b) Transfer of Property Act (4 of 1882), S. 14—Contract of sale does not fall within S. 14—It is enforceable against surviving members of joint Hindu family.

A contract of sale does not fall within the scope of S. 14 but it is enforceable against the surviving members of a joint undivided Hindu family. 38 Mad. 114 ; 29 Mad. 336 (F. B.), Foll.

[P. 386, C. 1.]

L. A. Govindaraghava Aiyar and *A. Venkataraghava Aiyar*—for Appellant.

C. V. Ananthakrishna Aiyar and *N. A. Vaidyanatha Aiyar*—for Respondents.

Judgment.—This is an appeal by the plaintiff from a decree dismissing his suit for specific performance of a contract of sale in favour of a temple of which he is the trustee, entered into between the Regulation Collector of Karvetinagar who was at the time the Dharmakarta of the temple and the late Venkataraya Reddy who was then the managing member of the family of the defendants. Under the agreement of sale the plaint lands were to be conveyed to the temple for a sum of Rs. 16,000, whenever the trustee pays that amount from the Devastanam funds. The Subordinate Judge dismissed the suit, on the ground that the plaint contract is void as offending the rule against perpetuities ; and the only question before us for decision is whether his judgment on this point is right. A suit, Original Suit No. 40 of 1902, was filed against the late Venkataraya Reddy as the managing member of his family for the recovery of the village of Veeraraghavapuram, which was in the possession of his family. Venkataraya Reddy defended the suit, and the suit was eventually compromised by the registered agreement which is now sought to be enforced. Venkataraya Reddy died in December 1905, and the defendants are the members of his family. The defendants were asked by the plaintiff to receive the sum of Rs. 16,000 and convey the suit lands to the temple, but they have not done so.

The material part of the agreement is as follows: "We both . . have entered into a compromise and I have agreed under that compromise to sell . . . these five villages and all my rights therein for Rs. 16,000 to the Devastanam of the said Subramaneswara Swamiar. Whenever the said price of Rs. 16,000 is paid to me from the said Swamiar Devastanam funds, I agree to execute a sale-deed for the said five villages at that very time for the said Subramania Swami Devastanam and deliver possession of the said villages to the said Devastanam." The Subordinate Judge is of opinion that as this plaint agreement fixes no time for its performance but leaves it indefinitely to the promisee to choose his own time and as it provides that the promisor shall convey the properties whenever the price happens to be paid out of the funds of the temple and the suit has now been brought after the death of Venkataraya Reddy against the surviving members of the family, such a contract is invalid and unenforceable as infringing the rule against perpetuities, and he relies on the case of *Kolathu Aiyar* v. *Rangavadhyar* (1). We are of opinion that his decision cannot be supported. Under S. 54 of the Transfer of Property Act a contract for the sale of immoveable property does not by itself create any interest in the

(1) (1915) 38 Mad. 114=18 I.C. 203.

property. Such a contract does not run with the land and is not binding upon a purchaser unless he takes with notice. It does not create an interest in the land, and is not, therefore, within the scope of S. 14 of the Transfer of Property Act. If this contract created an interest in the land, then even a purchaser without notice would have been bound by it. In the case of *Kolathu Aiyar* v. *Rangavadhyar* (1), the learned Judges Benson, and Sundara Aiyar, JJ., say that there is no substantial difference in the law to be applied in India and in England, as the Specific Relief Act lays down that an agreement for the sale of land may be specifically enforced against any person claiming under the vendor, except against a *bona fide* purchaser for value without notice (S. 27), and the Indian Trusts Act also lays down that a transferee taking with notice of a prior contract in favour of another must hold the property obtained under his transfer as trustee for the previous promisee (S. 91). We are unable to agree with this view. It is opposed to the Full Bench judgment in *Kurri Veerareddi* v. *Kurri Bapireddi* (2). The judgment of the learned Chief Justice in that case fully explains the law, and he points out there that S. 54 was intended to prevent the question being raised as to whether the law of England as to the legal effects of the contract of sale of land applied in this country. The same view was also taken in a subsequent judgment [*Avula Charamudi* v. *Marriboyina Raghavalu* (3)] by Aiyling and Tyabji, JJ., who disagreed with Benson and Sundara Aiyar, JJ. All the authorities are considered in these two judgments and we do not think it, necessary to refer to them in detail.

It is also clear that Venkataraya Reddy entered into the contract as the managing member of the family, and we are of opinion for the reasons above stated that the decision of the Subordinate Judge holding that the contact cannot be enforced for the reasons assigned by him, cannot be sustained.

We reverse the decree of the Subordinate Judge and direct him to restore the suit to his file and dispose of it in accordance with law. The costs will be provided for in the revised decree.

S. N./R.K.

Appeal allowed.

(2) (1906) 29 Mad. 336 (F. B.).

(3) (1915) 28 I. C. 871.

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MILLER AND SADASIVA AIYAR, JJ.

Manager to Lessees of Sivanganga Zemindari—Plaintiff—Appellant.

v.

Chidambaram Chetty and *others*—Defendants—Respondents.

Second Appeal No. 163 of 1912, decided on 25th September, 1913, against the decree of Dist., Judge, Ramnad, in A. S. No. 551 of 1911.

Madras Estates Land Act (1 of 1908), S. 42 (2)—Cl. 2 does not apply where lease provides that excess rent should be charged if excess land found to be taken—Scope of S. 42 (2) explained.

Clause 2 of S. 42 of the Estates Land Act, which requires the order of a Collector before an enhancement of rent can be allowed, does not apply to the case of a lease which provides that in case the area of the land should on measurement be found to be more than the area specified therein, the tenant should pay rent at an enhanced rate on the excess and the landlord seeks to recover such excess rent. [P. 387, C. 1.]

It is only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by S. 42 (*a*) of the Estates Land Act, that he should obtain under clause 2 the order of the Collector for such alteration of rent. [P. 387, C. 2.]

K. Srinivasa Aiyangar and *T. R. Venkatarama Sastry*—for Appellant.

V. Viswanatha Sastry—for Respondents.

Judgment.—The plaintiffs are the lessees of the Sivaganga *Zemindari* and they are the appellants before us. They are the landlords under the Estates Land Act. In 1899, a registered rent deed was executed by the defendants in favour of the plaintiffs. The terms of that agreement were that the defendants should pay assessment on the area of a certain holding at the rate of Rs. 11 per *Sei* in respect of *Ayan* lands in three villages leased to the defendants. The term of the lease has not yet expired. Under that same registered deed, the defendants agreed to pay assessment at Rs. 8 per *Sei* on the *Ayan* lands in a fourth village also leased under the same deed. The area of the leased lands in the three former villages was given in the deed as 19-3-5 *Seis*. The area of the

land in the fourth village was given as *Seis* 2-11-4. In paragraph 6 of the said lease deed, however, a provision was inserted, *viz.*, that, in case the areas of the lands should, on measurement, be found to be more than the areas mentioned above, the defendants should be liable to pay *theerva* at the rate of Rs. 27-8-0 per *Sei* on the excess so found from three years prior to the date on which such excess area was discovered. The plaintiff's allegations are that the plaintiff's Inspector discovered an excess of 2-3-15 *Seis* in one of the first three villages and 0-0-4 *sei* in the fourth village in June 1909 and that on this total area of 2-4-3, the defendants are liable to pay excess assessment at Rs. 27-8-0 per *Sei* from *Fasli* 1315 including the current *Fasli* of the plaint, namely, *Fasli* 1319. The suit was brought on the 27th May, 1910.

Several defences were raised by the defendants. It is necessary, however, for the purposes of this second appeal, to notice only one of them, namely, that contained in paragraph 4 of the written statement. The contention in that paragraph is that according to clause 2 of S. 42 of the Estates Land Act, the plaintiffs are not entitled to file a suit in respect of arrears for the excess measurement until the Collector had decided, on application by the plaintiffs, what such excess area was. The lower Courts accepted this contention and dismissed the suit without going into the other issues raised by the pleadings. We think that the decisions of the lower Courts cannot be upheld. S. 42 of the Estates Land Act corresponds to S. 52 of the Bengal Tenancy Act. Though S. 52 of the Bengal Tenancy Act does not contain the provision contained in the proviso to clause 2 of S. 42 of the Madras Estates Land Act, S. 188 of the Bengal Tenancy Act, imposes another condition before a claim by a landlord under that Act for an enhancement of rent can be recognised, *i.e.*, that in the case of joint landlords, all must act together. In *Dintarini Dasi* v. *Mr. L. P. D. Broughton* (1), the learned Judges had to deal with a case similar to the present. The term of the lease there was that "the landlords were at liberty to measure the land of the tenant and, if the area of the land be found greater in quantity than 150 *bighas*, its then estimated area, the tenant would pay rent at the rate of annas 10 per *bigha* on the area so found." The question was whether a suit brought by landlord for enhancement on this contract was a suit brought in respect of a right granted or declared by the Act in the landlord's favour and it was decided in the negative. The same question had been similarly decided in *Ram Chunder Chuckerbutty* v. *Giridhur Dutt* (2). It was only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by S. 42, clause 1 (*a*) and (*b*), that he should obtain under clause 2 the order of the Collector for such alteration of rent before he could claim the altered rent. As observed in *Dintarini Dasi* v. *Mr. L. P. D. Broughton* (1), "the plaintiff does not seek in this suit under the provisions of S. 52 of the Bengal Tenancy Act" (S. 42 of the Madras Estates Land Act) "to alter the rent of the defendant". He says the rent has automatically been altered by the provisions of defendant's lease on the land being measured and found to exceed 150 *bighas* in area. Applying this principle, it seems to us the proviso found in clause 2 of S. 42, which requires the order of a Collector before enhancement of rent can be allowed, does not apply to the claim of the plaintiff in this case. On similar grounds, the learned Judges in the Calcutta case held that the condition in S. 188 of the Bengal Tenancy Act that all the landlords should act together, did not apply to a suit brought for enhancement based on contract and not on S. 52.

The decrees of the lower Courts will, therefore, be reversed and the suit remanded for decision on the other issues raised in the case. Costs will be costs in the cause.

S. N./R. *F*

Case remanded.

(1) (1899) 3 C. W. N. 225.

(2) (1892) 19 Cal. 755.

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OLDFIELD AND SADASIVA AIYAR, JJ.

Venkataramanjulu Naidu and *another*—Plaintiffs—Appellants.

v.

Ramaswami Naidu—Defendant—Respondent.

Letters Patent Appeal No. 221 of 1914, decided on 20th July, 1915, against the

Judgment of Seshagiri Aiyar, J., dated 24th February, 1914, in Civil Rev. Pet. No. 354 of 1914.

(a) Civil P. C. (5 of 1908), S. 115—S. 115 empowers revision of Presideney Small Cause Court decree—Question of fact cannot be gone into—Mere mistake of fact or law is no ground for interference.

Under S. 115 a High Court can revise a decision of a Presidency Court of Small Causes. 31 Bom. 138, diss. from; 30 Cal. 588; 37 Cal. 714; 30 Cal. 986, Foll. [P. 388, C. 1.]

But its powers under S. 115 (*a*) and (*b*) are not co-extensive with its powers in appeal, it cannot, therefore, go into facts nor can it interfere on the ground of mere mistake in fact or law.

[P. 388, C. 2 & P. 389, C. 1.]

Oldfield, J.—A wrong decision of a question with which a Court is competent to deal cannot affect its jurisdiction to pass a decree based on that decision though a Court cannot confer jurisdiction on itself by the wrong determination of a question. [P. 388, C. 2.]

(b) Provincial Small Cause Courts Act, (19 of 1887), S. 25—Discretion to interfere on technical ground will not be exercised in cases where justice is done—S. 115, Civil P. C. is much more restricted.

Per *Sadasiva Aiyar, J.*—Even in the case of revision under S. 25 of the Provincial Small Cause Courts Act, the High Court has a discretion to interfere or not and where substantial justice has been done in the lower Court, it is not advisable to use revisional powers on purely technical grounds. 17 I. C. 748, Foll.

[P. 389, C. 1.]

Much less is it advisable to interfere when the Hight Court's powers of revision are invoked under S. 115, Civil P. C. [P. 389, C. 1.]

N. Chandrasekhara Ayyar—for Appellants.

M. O. Parthasarathy Aiyangar and *K. V. Krishnaswami Aiyar*—for Respondent.

Oldfield, J.—On the first point dealt with by the learned Judge, this Court's power to revise the decisions of the Presidency Small Cause Court, I follow the Calcutta cases, *Haladhar Maiti* v. *Choytonna Maiti* (1), *Sarat Chandra Singh* v. *Brojolal Mukerjee* (2), *Ramdin Bania* v. *Sew Baksh Singh* (3) in preference to *Ismalji Ibrahimji Nagree* v. *Macleod* (4) decided in Bombay, the former moreover being in accordance with the practice in this Presidency. The learned Judge's decision in favour of the existence of this Court's powers of revision must be sustained.

The question is then whether their exercise was justified in the case before him, one of a decree for ejectment under S. 41, Presidency Small Cause Courts Act, obtained on a finding as to the validity of the notice given, which the learned Judge held to be and which may for the present purpose be treated as being mistaken in law. It is contended that this decree can be revised because it was passed in the exercise [to follow the wording of S. 115 (*a*) of the Civil Procedure Code] "of a jurisdiction not vested in the Small Cause Court by law," inasmuch as the determination of the tenancy by a valid notice was a condition precedent to the exercise of jurisdiction under S. 41 and was not fulfilled.

This seems to me unsound because the validity of the notice in question was no more a condition precedent to the exercise of jurisdiction than any other fact the establishment of which might be necessary before a decree could be given, if other facts had been put in issue. And in fact the principle involved in the contention would, if accepted, entail that the Court's powers under S. 115 (*a*) and (*b*) are co-extensive with its powers in appeal. So broad a principle requires strong authority to support it. But none has been adduced and there is the clear language of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (5) to show that the wrong decision of a question, with which the Court is competent to deal, cannot affect its jurisdiction to pass a decree based on that decision. It is no doubt true that a Court cannot confer jurisdiction on itself by the wrong determination of a question; and in order to reconcile this principle with that enunciated by the Privy Council it may be necessary to adopt some definition of the term "jurisdiction" such as that proposed by Woodroffe, J., in *Shew Prosad* v. *Ram Chunder* (6). If the definition which he prefers, that based on the presence of local, personal or pecuniary consideration or the nature of the subject-matter of the suit, be adopted, the result would be in accordance with the form of S. 115, since objections to the Court's competence to entertain the proceedings or to its refusal to entertain them would then be covered

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(1) (1903) 30 Cal. 588.
(2) (1903) 30 Cal. 986.
(3) (1910) 37 Cal. 714; 6 I. C. 473.
(4) (1907) 31 Bom. 138.
(5) 11 Cal. 6=11 I. A. 237 (P. C.).
(6) A. I. R. 1914 Cal. 388=23 I. C. 977; 41 Cal. 323.

by S. 115 (*a*) and (*b*), whilst S. 115 (*c*) would deal with all action and refusal to take action after the beginning of the trial, which otherwise complied with its requirements. It is, however, unnecessary to elaborate the discussion further in this direction, since there is, in my opinion, no ground for treating the establishment of the validity of the notice in the case before us as having any more special character than the other facts essential to a decision on the merits or as a condition precedent to the exercise of jurisdiction. I, therefore, cannot uphold the learned Judge's interference with reference to S. 115 (*a*).

We have also considered it with reference to S. 115 (*c*). But it is clear from the Privy Council decision already referred to that we cannot interfere on the ground of mere mistake in fact or law, and we have been shown nothing also. For it is not suggested that the conduct of the trial in Small Cause Court was in any respect irregular or illegal.

In these circumstances, the Letters Patent Appeal must be allowed, the decision of the learned Judge being set aside and that of the Small Cause Court Judge restored. The defendant will pay the plaintiffs' costs throughout.

Sadasiva Aiyar, J.—There are absolutely no merits in the defendant's case. Taking it that on the construction of the rental agreement the defendant is entitled to be in possession for a term of not less than 15 years and 6 months, that is, till the 29th December 1912, the present suit was brought in ejectment in 1913 and the defendant had notice in October 1911, more than 15 months before the suit was brought, that the plaintiffs were determined not to allow him to occupy the premises for a day more than the defendant was entitled to do. Even in the case of revision under S. 25 of the Provincial Small Cause Courts Act, the High Court has discretion to interfere or not and where substantial justice has been done in the lower Court, it is not advisable to use revisional powers on purely technical grounds. [See *Gopala Iyengar* v. *Venkatakrishna Iyengar* (7)]. Much less is it advisable to interfere when this Court's powers of revision are invoked under S. 115 of the Civil Procedure Code.

(7) (1912) 17 I.C. 748.

On the point whether a question of jurisdiction is involved in this case so as to allow of interference under S. 115, it has, no doubt, been held in *Vuppuluri Atchayya* v. *Sir Kanchumarti Venkata Seetarama Chandra Rao* (8) that where an Appellate Court by reason of error of law decides that the Court of first instance has or has not jurisdiction to entertain a suit *taking the facts alleged in the plaint as proved*, the High Court can interfere under S. 115 with the wrong decision of the Appellate Court. I was the dissenting Judge in that Full Bench case. That decision (I fully admit) is binding upon me notwithstanding that two very learned Judges of the Calcutta High Court in *Shew Prosad* v. *Ram Chunder* (6) have taken the view which is almost identical with mine. But all those observations of that very learned Judge (Sundara Aiyar, J.) in his judgment in the above Full Bench case which went beyond the actual conclusion of the Full Bench are *obiter* and not binding. The judgment of the Chief Justice (then Mr. Justice Wallis) in that case confined itself to the point which arose for actual decision.

In the present case, the allegation in the plaint being that proper notice to quit had been given to the defendant, the jurisdiction of the Presidency Small Cause Court over the suit was clearly not taken away by any provision of the common or the Statute Law and the Small Cause Judge did not clutch at jurisdiction through any error of law committed by him. The decision in *Vuppuluri Atchayya* v. *Sir Kanchumarti Venkata Seetarama Chandra Rao* (8) does not apply, therefore, to this case and the learned Judge of this Court whose decision is appealed against had, therefore, no jurisdiction to interfere under S. 115 with the judgment of the Small Cause Court. I agree, therefore, that this appeal should be allowed.

S.N./R.K.

Appeal allowed.

(8) (1913) 18 I.C. 555.

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SADASIVA AIYAR AND NAPIER, JJ.

Vardiparthi Ramayya—Appellant.

v.

Korukonda Jagannadham and *another*—Respondents.

Appeal No. 67 of 1913, decided on 11th August, 1914, against the Appellate decree of Sub-Judge, Cocoanada, in Appeal Suit No. 77 of 1912.

Civil P. C. (5 of 1908), O. 21, R. 57—Rule 57 applies only if execution is dismissed after the act came in force.

O. 21, R. 57, which provides that on the dismissal of an execution application the existing attachment on the attached property shall cease, can only apply to orders of dismissal passed after the Act came into force. [P. 390, C. 2.]

G. Venkataramiah—for Appellant.

P. Narayanamurthi—for Respondents.

Facts—of the case appear from the following portions of the Subordinate Judge's judgment :

"The decree is dated 27th February 1899 and it became 12 years old on 27th February 1911. The last execution petition (Execution Petition No. 485 of 1911) was put in on 26th June 1911 : which was nearly four months after 27th February 1911 ; but the record shows that the sale of certain immoveable property which was ordered by the Court in the execution of the above decree, was on 21st February 1910, stayed by an injunction issued in Original Suit No. 96 of 1910 on the file of the lower Court. Both the parties to the appeal agree that the above Suit No. 96 of 1910 was disposed of on 7th June 1911 and there is nothing on record to show that the above injunction was withdrawn during the pendency of the above suit. When the injunction was not withdrawn it must be taken to have terminated at the disposal of the suit and the suit was disposed of on 7th June, 1911. *Gulam Nasir-ud-din* v. *Har Deo Prashad* (1) shows that when an injunction like the above is issued the period during which the injunction is in force should be calculated in the decree-holder's favour although during the period of the injunction it may be open to him to proceed against any other property of the judgment-debtor. By the effect of the above ruling the period between 21st February, 1910 and 7th June, 1911 must be excluded in computing the period of 12 years referred to in S. 48 of the Civil Procedure Code. If the above period be excluded in the present case, Execution Petition No. 485 of 1911, which was the last application of the decree-holder, was well within time. I hold, therefore, that the above execution petition was not barred by the 12 years' rule under clause 1 (a) of S. 48 of the Civil Procedure Code and that the application was within time.

"The order of the lower Court is reversed and the execution petition is remanded to it with a direction that it be restored to file and disposed of according to law. Costs in this appeal to abide and follow the result."

Judgment.—The learned Subordinate Judge ought to have pronounced an opinion on the question whether the attachment made in 1907 was subsisting when the new execution application for sale was made in 1911.

The District Munsif considered that that attachment, though pending on 1st January 1909 came to an end by coming into force of the new Civil Procedure Code on that date, that is, the coming into force of O. 21, R. 57, contained in that Code. If the District Munsif was right in that view, the Execution Application of 1911 which prayed for sale of the property could not be granted (as it stood as the petition ought to have prayed for both attachment and sale.)

However, it is unnecessary to remand this case for a finding on that question, as it is a pure question of law which we could decide ourselves.

We are clear that O. 21, R. 57, which provides that, on the dismissal of an execution application, the existing attachment on the attached properties shall cease, can only apply to orders of dismissal passed after the Act came into force.

The other ground on which the District Munsif dismissed the application as barred has been dealt with by the learned Subordinate Judge, and we are prepared to follow *Ghulam Nasir-ud-din* v. *Har Deo Prashad* (1) which is relied on by the Subordinate Judge.

The Subordinate Judge was, therefore, right in remanding the execution case to

(1) (1912) 34 All. 436=14 I. C. 343.

the District Munsif for disposal on the merits; and we dismiss the appeal against that remand order with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 391
Full Bench.

WALLIS, C. J. AND SADASIVA AIYAR AND SRINIVASA AIYANGAR, JJ.

Chakkara Kannan—Plaintiff—Appellant.

v.

Varayalankandi Kunhi Pokker and *others* - Defendants—Respondents.

Second Appeal No. 2078 of 1910, decided on 12th August, 1915, from the decree of Sub. Judge, Tellicherry, North Malabar, in Appl. Suit No. 241 of 1909.

(a) Malabar Law—*Marumakkathayam* Law—Gift to wife or children - Presumption is that donees take with incidents of Tarwad—Subsequently born persons have no share but only entitled to maintenance—Individual share is not attachable or transferable—(Per Wallis, C. J.) Quære—Whether Gift to mother and some of her children of tarwad property is valid.

Where properties are given by a person to his wife and children, or children alone, following the *Marumakkathayam* Law, the presumption is that the donees take the property with the incidents of *tarwad* property, including those mentioned; persons subsequently born into the *tavazhi* are entitled to be maintained, but not to claim partition, and an individual cannot alienate his share nor can it be attached and sold in execution of a personal decree against him.

[P. 399, C. 2.]

Per *Wallis, C. J.*—*Quære*:—Whether a gift with the incidents of *tarwad* property could be made to the mother and some of her issue only, *viz.*, those by a particular husband?

[P. 399, C. 1.]

(b) Malabar Law—*Marumakkathayam* Law—Rule against perpetuities is not applicable to gift to persons forming joint Hindu family or forming *Tavazhi*.

Per *Sadasiva Aiyar J.*—The rule against perpetuities cannot be applied so as to defeat gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property, or to the whole of a group of persons following the natural law of *Marumakkathayam* forming a natural *tavazhi* group. [P. 399, C. 2.]

(c) Malabar Law—Woman marrying another and begetting other children—Two separate groups in same *Tavazhi* are formed—Senior member of such group is the *Karnavan*.

The result of a woman marrying another husband and be getting other children to the latter is that there will be two separate groups in the same *tavazhi*, holding separate *tavazhi* property, the senior male in each *tavazhi* group being the *karnavan* of that *tavazhi* group. [P. 399, C. 2.]

(d) Malabar Law—*Marumakkathayam*—Gift to wife and children does not make them tarwad or *tavazhi*—But if gift is according to *Marumakkathayam* Law they hold as *Tavazhi* and senior male member become manager of that *Tavazhi*—Incidents of tarwad apply—Personal Law regulates succession.

Per *Srinivasa Aiyangar, J.*—It is not the giving of properties by a person to his wife and children that constitutes them a *tarwad* or *tavazhi*, but that if properties are given to a wife and children following the *marumakkathayam* Law, they as a *tavazhi* hold those properties with incidents of *tarwad* property, and the right of management of the properties is vested in the senior male member of that *tavazhi*. [P. 402, C. 2.]

If the *tarwad* can purchase and hold properties with the incidents of *tarwad* property there is no reason why they should not take a gift and hold the properties with the ncidents of *tarwad* property. The gift is made to the entity which is called the *tarwad* or *tavazhi* and the law governing the parties regulates the mode of succession and enjoyment. 16 Mad. 201, (F.B.), affirmed and Foll.; 24 Mad. 73; 25 Mad. 149; 29 Mad. 322; 31 Mad. 228; 32 Mad. 315; 4 I. C. 90; 34 Mad. 245; 6 I. C. 1017; 8 I. C. 367; 35 Mad. 648; 34 Mad. 387; 23 Cal. 670 (P.C); 6 All. 560 (P.C.); 36 Mad. 484; 38 Mad. 48 (F.B); 32 Mad. 351 (F.B.) ref. to. 26 Bom. 445; and 33 All. 665, Dis. [P. 402, C. 1 & 2.]

R. Ramachandra Aiyar—for Appellant.

J. L. Rosario—for Respondents.

Order of Reference

Sankaran Nair, J.—The suit out of which this second appeal arises was brought by the plaintiff-appellant for partition and possession of the interest of the 1st defendant, which he had purchased in execution of a money-decree obtained by him. The 2nd and 3rd defendants are respectively the brother and niece of the first defendant, and they contend that the first defendant had no such interest in the property as could be attached and sold. Their case is that the property is held by them with the incidents of *tarwad* property. Both the lower Courts have dismissed the plaintiff's suit.

One Pakran made a gift of certain properties to his two sons, the 1st and 2nd defendants, and a daughter, Pathumma whose daughter is the 3rd defendant. The question for decision is whether they took the property as joint tenants or tenants-in-common or whether they took it only as members of the *tarwad*, none of them having any interest liable to be attached and sold. The material portion of the instrument of gift runs thus: "I

have settled by this that the properties .....and all dealings in my name and all moveables are to be enjoyed by me till my death according to my pleasure, and after my death they are to belong to my children, Ammadkutti (2nd defendant), Kunhi Pokker (1st defendant) and Pathumma (the mother of the 3rd defendant), and that no one else has any right to my properties. Properties and dealings which I may acquire in future also are for the said children. After my death the above-mentioned persons, who are my children, are to collect all outstandings due to me and arrears of rent and the assessment which was in my name has to be transferred in the names of my children and *patta* obtained, and they are to hold the same in the same way I was holding them, paying the *porappad* due to the *jenmies* and getting renewals in their names." Now there can be scarcely any doubt that, if we look to the terms of the instrument alone, the three donees therein named took an absolute interest and so far as their right of alienation is concerned it makes no difference whether they are tenants-in-common or joint tenants as in either case any of them could alienate his interest in the property. But it is contended, and the contention has a good deal of force in it, that the decisions have laid down the principle that the donees in such cases must hold the property with the incidents of *tarwad* property and that, therefore, Kunhi Pokker, the 1st defendant and one of the donees and the judgment-debtor, had no saleable interest in it.

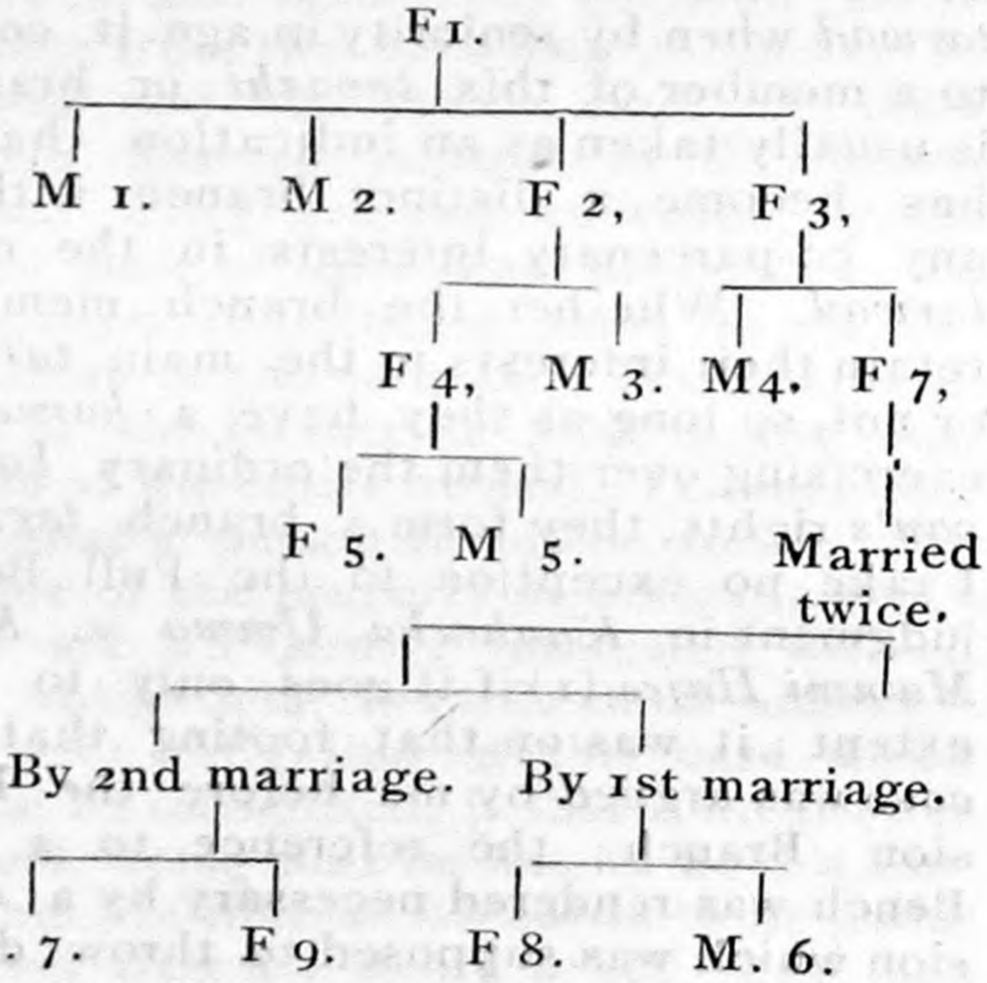
The case that is mainly relied upon is that of a Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1). There were a series of decisions before that on the question of the liability of the interest of one of the donees to be attached and sold—some of them, following the case *Narayanan* v. *Kannan* (2), which was a decision to the contrary and others not apparently following it. Many of them will be found reported in the foot-notes to the Full Bench judgment in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1). *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) was a case in which the properties were given after a person's death by his legal representatives to his widow and her children in accordance with his orally expressed wish, and the question was whether the interest of one of the children could be attached and sold. Mr. Justice Best was of opinion that they held the property as joint tenants under English Law, as there were all the four unities of a joint tenancy, that is (1), of possession, (2) of interest, (3) of title and (4) of the commencement of such title, and, therefore, the interest of the judgment-debtor who had died could not be attached and sold. This view cannot be accepted. See the Privy Council decision in *Jogeswar NarainDeo* v. *Ram Chandra Dutt* (3). Mr. Justice Subramania Aiyar contended himself with saying that there was a conflict of decisions and the question was, therefore, one that should be decided by a Full Bench. The Full Bench delivered the following judgment: "In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of *tarwad* property in accordance with *Marumakkathayam* usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (4) and *Mahomed Shumsool Hooda* v. *Shewakram* (5)" and they expressed the opinion that the decision above referred to, *Narayanan* v. *Kannan* (2), is in conflict with the rule of construction indicated by the Privy Council. Now, it will be observed that in the Full Bench case the judgment-debtor had died, and the question whether he left any interest liable to be sold is very different from the question which arises here. Again, there was no instrument of gift and the intention was imputed to the donor only in the absence of any expression of his intention while in the case before us there is an expression of the donor's intention. The Privy Council judgments have application only to gifts to a Hindu

(1) (1893) 16 Mad. 201.
(2) (1884) 7 Mad. 315.
(3) (1896) 23 Cal. 670=23 I. A. 37 (P. C.).
(4) (1865) 4 W. R. 114; 6 M. I. A. 526 (P.C.).
(5) (1874) 22 W. R. 409; 2 I. A. 7.

woman who generally takes only a life-interest. It is the other way in the case of a Malayalam woman, the theory of the *Marumakkathayam* Law being that the property is vested only in the famales, the males having only the right of maintenance. For these reasons I should have held without hesitation that the present case is not governed by the Full Bench decision but for the reason that the later decisions of this Court have apparently included within its scope cases of this kind. It becomes necessary, therefore, to consider the question more fully.

If it is to be held that the three donees in the case before us held the property with the incidents of *tarwad* property and that any one of them could not convey his interest, then it would be directly contradicting the terms of the instrument Exhibit I, because Exhibit I distinctly recites that the donees were to hold the property "in the same way I was holding them," or, in other words, those three persons could alienate it even if such alienation may not be in the interests of the branch to which they belong, which would include the 3rd defendant, a daughter of Pathumma. The will states that no one else besides the three donees named has any right to the properties, whereas, if they belonged to the branch, the descendants of Pathumma born before or after the death of the testator would be entitled to them in their own right and not as representatives of any donee, so that, if we were to decide the case on the construction of the instrument of gift alone, I should have little hesitation in holding that I must give effect to the terms of the instrument and should not import any artificial intention into the case. But the decisions that I have referred to have no doubt held that in such cases the properties must be deemed to be held with the incidents of *tarwad* property.

The rule of decison is that indicated by their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3), in which they expressed their dissent from a decision of the Madras High Court reported as *Vydinada* v. *Nagammal* (6), to the effect that, where a Hindu testator devised certain properties to his nephew and his wife, they took them as joint tenants and the nephew could not sever the joint tenancy by an alienation by him alone to a creditor. The Judicial Committee pointed out, 'the principle of joint tenany appears to be unknown to Hindu Law except in the case of co-parcenary between members of an undivided family', and in the second place, even if it is a joint tenancy under English Law, that joint tenancy could be severed by a conveyance or an equivalent of conveyance. According to this, therefore, it is where a co-parcenary might exist according to the rules of the *Marumakkathayam* Law that the property given to certain members of a *Marumakkathayam* family may be deemed to be held by them as co-parceners. Under that law it is only *tarwad* property or the property of a branch who hold certain properties as their branch property in the same way as a *tarwad* with their own *karnavan*, *etc.*, that is really held in co-parcenary right. As in my view the right decision of the question mainly depends upon an appreciation of what properties are held as co-parcenary property, I will explain it in some detail.



M 1, the senior male member would be the *karnavan* of the entire *tarwad* and in management of all its properties. He is the guardian of the infants or children born to any of the female members: he is bound to look after them, maintain them in the *tarwad* house and give them the education customary among such *tarwads*. Any female and her children form a *tavazhi* or branch. *Tavazhi* literally means *tayar*, mother, and *vazhi*, line, that is mother's line. Very often

(6) (1888) 11 Mad. 258.

a woman and her descendants live apart from the *tarwad* house in a house of their own with properties belonging exclusively to their branch, the senior member amongst them having all the rights and obligations of the *karnavan* of an ordinary *tarwad*. Such a branch or *tavazhi* is constituted or created by gifts from the father of the woman or by gifts from a favourite brother or maternal uncle, or, it may be, by the self-acquisition of any member of that branch which he would often reserve for the sole benefit of the members of his branch. The *karnavan* of the main *tarwad* does not exercise his rights over the members of this branch or interfere in the management of the exclusive properties of that branch. In all such cases what the interests of that branch are in the main *tarwad* and its properties has often been discussed. If they wish to preserve their rights, which carry with them their obligations in the main *tarwad*, then the senior member of that branch when he becomes the senior of the main *tarwad* also assumes the headship or *karnavanship* of the main *tarwad*. Failure to assume the *karnavanship* of the main *tarwad* when by seniority in age it comes to a member of this *tavazhi* or branch, is usually taken as an indication that it has become a distinct branch without any co-parcenary interests in the main *tarwad*. Whether the branch members retain their interests in the main *tarwad* or not, so long as they have a *karnavan* exercising over them the ordinary *karnavan's* rights, they form a branch *tarwad*. I take no exception to the Full Bench judgment in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) if it goes only to that extent ; it was on that footing that the case was argued by me before the Division Branch ; the reference to a Full Bench was rendered necessary by a decision which was supposed to throw doubt even on that doctrine.

But let us take a case where a female and her children remain in the *tarwad* house under the control of their *karnavan* and certain properties are given to them by their father. Now they are four possible views. (1) One view is that they constitute a *tarwad* by themselves with reference to that property. (2) Another view is that those members hold the property in the same way, for instance, as the members of a *Mitakshara* family do in Bengal, substituting females for males, that is they may be entitled to partition but before partition their interests are not liable to be attached and sold. (3) A third possible view is, that they hold in the same way as the properties held by a *Mitakshara* family according to the Madras decisions, that is, they are entitled to partition but their interest also is liable to be attached and sold during their life-time but not after that. (4) Another view is that it may be attached and sold even after death.

I have already stated that, if the Indian Law Reports 16 Madras case is to be understood as applying to the members of a *tarwad* who live apart from the main *tarwad* house holding their own property and having their own *karnavan*, I accept that decision. Mr. Justice Moore and I have also followed that decision, nor do I see any reason to question it in so far as it holds that the interest of a member cannot be attached and sold after his death.

But, it is said that, according to that decision, even if the members do not form a separate *tavazhi* holding separate property, they hold the properties gifted to them (we will say), by the husband of the woman, with all the incidents of a *tarwad*, etc. Now, what is the position of that group of members ? Take it in the table above given, the husband of F7 gives certain property to her and to her children F 8 and M 6. It cannot be contended for a moment that they are constituted into a separate *tarwad* or a separate *tavazhi*, with the *tarwad* incidents, by themselves, for M1, the *karnavan* of the entire *tarwad*, does not lose his rights over the children F8 and M6 if minors, and even F7 if she is a minor, or any children that may be hereafter born to F7 and F8. Nor do they lose their corresponding rights in the *tarwad* house and its property. For the same reason the senior male in that group cannot displace the old *karnavan* and succeed to his rights over the other members. This view, which Mr. Justice Moore and myself put forward in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (7), has been accepted in the subsequent cases which have reference to that doctrine. Now, if they do not constitute by themselves a

(7) (1906) 29 Mad. 322.

separate *tarwad* or *tavazhi*, is there any reason why to the donor must be imputed an intention that they should hold the property with the incidents of *tarwad* property? This would lead to startling results. Supposing F7 marries again after the divorce by or of the first husband or after his death. Then the children that might be born to her by the second husband M 7 and F9, would also form the members of the *tavazhi* to which their mother and her children by her first husband belong, because the mother is the root of the *tavazhi* and the father has no place in the system, and they (*i. e.*, children by the 2nd husband) would acquire an interest in the property given by her first husband. It is obvious that we cannot impute to the first husband an intention that the children born to his wife by another person should benefit in the gift which he made for her and her children's use. Once it is recognised that a woman and her children by one husband are incapable of forming a *tavazhi* or joint family by themselves only, to the exclusion of the children that may be born or have been born to her by another husband, it seems necessarily to follow that they do not take as a *tavazhi* or as co-parceners according to the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3) already referred to. Even in cases of inheritance it has been held by a Full Bench of this Court that the co-parcenary principle does not generally apply: *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (8); *a fortiori*, therefore, in cases of gifts which stand in this respect on the same footing as wills. This is in accordance with the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3), that in the absence of anything to the contrary the donees take as tenants-in-common. Again, the husband may himself be a follower of the Muhammadan Law or of the Hindu Law called in Malabar the *Makkathayam* Law of inheritance, and in Indian Law Reports 16 Madras itself the donor was probably a follower of Muhammadan Law. The Chief Justice and Mr. Justice Wallis in *Pattatheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji* (9) assumed it to be so and applied it to a case where the father followed the Muhammadan Law of inheritance. Now what reason is there to impute to him an intention that his children should be governed by the incidents of the *Marumakkathayam* Law? If the intention is to be presumed from the general inclination of a person towards a particular system of inheritance, then it is almost impossible to presume such intention in the case of a Muhammadan donor, and the reason that I suggest next would show that such a presumption ought not to be made even in any other case.

How does it stand on principle? Ordinarily a *karnavan's* rights are commensurate with his obligations. He has the custody of the entire property in which all the members of the *tarwad* are interested, to hold it for the benefit of them all, to maintain them in the family house and to educate them. Now, if the properties gifted by a father are to be held with the incidents of *tarwad* property and the senior male member amongst them is to hold it without any right of the other members for partition, what is the result? They are not maintained out of it, because living in the *tarwad* house they get their maintenance from the *karnavan* of the entire *tarwad* and the senior male of their branch has no control in the *tarwad* house. They are not educated by the senior male of their branch, because the obligation to educate them is on the *karnavan* of the *tarwad*. The guardianship of the infants is also in the *karnavan* of the entire *tarwad*. I cannot imagine that a person should be in the possession of the property of others in which they are all jointly interested without any obligations towards those others—the only obligation in this case which would be recognised, if this contention is upheld, being that he has to hold it during his life-time as *karnavan* to be handed over after his death to the next man to be held in the same way, no other member getting any benefit out of it. I can hardly conceive that any donor would intend that his property should be enjoyed only by the senior male amongst his descendants to the exclusion of others. That senior male might be—and it has often turned out to be—the son of one of the daughters; and his own sons, who might be junior in age to his grandson by one of the daughters, get no benefit in any form whatever, or again, if the donor

(8) (1904) 27 Mad. 300.
(9) (1908) 31 Mad. 228.

has only daughters, the property will be held by one of their sons to the exclusion of them all. I do not think that such a result as this is ever contemplated by the *Marumakkathayam* Law which, in theory, vests the property in females only. It follows from what I have said that we should not uphold the impartibility of such property nor the absolute right of the senior male member to manage the property to the practical exclusion of the others, as in an ordinary *tarwad* property. Such impartibility without any right of the other members to participate in the enjoyment of its income is undoubtedly against the general feeling of the people. If the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) leads to this conclusion, then I am of opinion that it should be reconsidered. I think myself that it does not.

Let us see how far the Privy Council case that is relied upon is against this view. That was the case of a gift by will to a daughter-in-law. Their Lordships of the Privy Council made the following observations: "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate" [*Mohamed Shamsool Hooda* v. *Shewukram* (5)]. As their Lordships point out, a Hindu desires that the estate should be retained in his family. In the case before us there is no such presumption if the donor follows the *Marumakkathayam* Law of inheritance, as he is giving the property to strangers to his *Marumakkathayam* family. If he is a follower of the Muhammadan or Hindu Law, the presumption would be exactly the other way, *i.e.*, that the donees should not enjoy it as a *Marumakkathayam* family. Then, their Lordships say that the donor must be taken to have known that the donee, in that case, a woman, cannot, as a general rule, take an absolute inheritance. That presumption does not apply, as I have already pointed out, to Malabar. On the other hand, no presumption ought to be drawn that his sons other than the senior male are to get scarcely any benefit out of it. I do not think, therefore, the Privy Council decision compels us to impute any artificial intention to the donor, and in particular, when there is an instrument of gift, I am satisfied that we ought to go upon the words of the instrument. It does not, of course, follow from this that one of these donees may either sell his share or a creditor may attach and sell his interest in execution of a decree. If we follow the Madras decisions in reference to the *Mitakshara* family, he would be so entitled to do, but if we follow the Bengal decisions, which proceed perhaps upon the true theory of Hindu co-parcenary law, he will not be entitled to do so. Where certain members of a Hindu family earn property, there is no presumption that they hold it as co-parcenary property.

Similarly it has been held that in the case of followers of *Marumakkathayam* Law also there is no such presumption. See *Govindan Nair* v. *Sankaran Nair* (10).

It is desirable on account of the apparent conflict of opinion that the matter should be settled by a Full Bench. I would, therefore, refer the following questions to a Full Bench:—

(1) When properties are given by a person to his wife and children or children alone following the *Marumakkathayam* Law, do the donees constitute by themselves a *tarwad* or *tavazhi*, and if they do so, is the right of management of the properties forming the subject of the gift vested in the senior male member thereof?

(2) If the first question is answered in the affirmative, whether in such cases the other members of the *tavazhi*, including those who become members of it by birth, are entitled to maintenance, etc., out of such properties, in the same manner as they were entitled before the gift to receive maintenance out of the properties belonging to the main *tarwad*; and whether they are entitled to partition of the said properties?

(3) Can any one member of the *tarwad* or *tavazhi* so constituted alienate his share, or can his interest be attached and

(10) (1909) 32 Mad. 351; 2 I. C. 183 (F. B.).

sold by a decree-holder in execution of a decree against any one of them?

I have not dealt separately with the following decisions: *Katankandi Kona* v. *Thamburan Kandi Sivasankaran* (11); *Chakkantavida Chakkan Abdulla* v. *Thazhath Chekkootti* (12); *Mooriyat Putikayil Kuntimina* v. *Mooriyat Patikayil Kuntambi* (13); *Parvathi Kattilammah* v. *Ramachandra Ejaman* (14), as they all may be supported on the ground that the donees in those cases formed a *tavazhi* living separately from the *tarwad* under their own *karnavan* as practically a distinct *tarwad*. There is at any rate nothing in the judgments that they were not living as a *tarwad* by themselves under their own *karnavan*.

Tyabji, J.—I agree that the questions mentioned by my learned brother should be referred to a Full Bench.

The case of *Kunhacha Umma* v. *Kutti Mammi Hajee* (1), as I understand it, decided, so far as is at present material, that where the donees are governed by a law under which property must be, or usually is, held with the incidents of *tarwad* property, there a gift will be presumed, at least in the absence of circumstances showing a contrary intention, to be held by the donees, impressed with such incidents.

I had occasion recently to take part in a decision in which a point similar to that with which we have now to deal arose. (*See* Second Appeal No. 1415 of 1910). In that appeal what I intended to take part in laying down was that, when the donor and the joint donees are all governed by the same system of law, *viz.*, the *Marumakkathayam*, a gift will presumably be governed, and the subject of the gift will, in the hands of the donees, continue to be affected, by the incidents of that law, provided, of course, that if that law permits of property being held in two or more different ways, then it will be a question to be determined under which of the various recognised modes of holding property the donees are to hold the subject of gift; the answer to such question necessarily depending on the construction that has to be placed on the terms of the gift. In Second Appeal No. 1415 of 1910 I understood that the learned Pleader who appeared for the appellant before us conceded, *first*, that the donor and the donees were alike governed by the *Marumakkathayam* Law, *secondly*, that under that law property had necessarily to be held with the incidents of *tarwad* property, *thirdly*, that, assuming that the law in question recognises the holding of property without the incidents of *tarwad* property, that mode of holding property was rather unusual, and there was nothing to indicate that the subject of gift in that particular case was intended to be held with incidents other than those of *tarwad* property.

However, my learned brother, to whose experience and knowledge of the subject I need not allude, in his judgment mentions considerations which would throw great doubt on the permissibility of postulating those propositions which form the basis of the judgment in Second Appeal No. 1415 of 1910. For I gather from the judgment of my learned brother that under *Marumakkathayam* Law itself not only is there no necessity for holding property with the incidents of *tarwad* property, but that property cannot be so held unless it is given to or acquired by a *tarwad* as such, or, in other words, unless, prior to the gift or acquisition, the donees or persons acquiring constitute a *tarwad* or a *tavazhi*. I see also the difficulty in holding that a new *tarwad* or *tavazhi* should come into being by the mere fact of a gift being made to several persons as joint donees; or that a gift can by itself constitute the donees into a *tarwad* or a *tavazhi*. Again, it is not very probable that there should be any intention on the part of the donor —especially when he is a Musalman—of so constituting the donees into a *tarwad* or *tavazhi*, even where the donees are related to each other by being the wife and the children of the donor: where the donees are members of different *tarwads* and bear no relationship to each other, the improbability of there being any such intention would be still greater; further, the question whether, even assuming that the donor intends so to constitute the donees into a new *tarwad* or *tavazhi*, the law empowers him to do so, requires careful consideration. The question may also arise, when the rights

(11) (1909) 4 I.C. 90.
(12) (1911) 34 Mad. 245; 5 I.C. 928.
(13) (1909) 32 Mad. 315; 1 I.C. 195.
(14) (1910) 6 I.C. 1017.

of the parties have to be determined with reference to a set of circumstances which do not seem to have been contemplated at the time when the well-recognised rules of custom arose, nor to have been specifically provided for by rules of custom which are known to prevail, whether in such matters effect ought to be given to "logical conclusions which may seem to an acute modern dialectician to follow" from the rules imposed by ancient customs [*cf. Baqar Ali Khan* v. *Anjuman Ara Begam* (15)]. It may be that in such matters effect ought to be given rather to the ordinary notions and wishes of the parties, even though such notions and wishes may not in strict logic be in conformity with the prevailing customs nor have taken a shape sufficiently definite to be considered as embodying an independent rule of customary law, but may only furnish indications of what justice, equity and good conscience would require.

On many of the matters involved in this reference (to some of which I have alluded above) I feel that there are not sufficient materials at present available which would enable me to express an opinion.

I, therefore, agree that the questions mentioned in my learned brother's judgment be referred to a Full Bench.

Opinion.

Wallis, C. J.—It seems desirable at the outset to point out that the decision of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) which is questioned in the reference merely decides that among the followers of the *Marumakkathayam* Law, when a gift is made by the father to the mother and her children, there is a presumption that they are intended to take such properties as the exclusive properties of the branch or *tavazhi* consisting of the mother and her children, that is to say, with the usual incidents of *tarwad* property. In the absence of express provision, the presumption is that the property is to be enjoyed by the mother and her issue in the way in which property is customarily held and enjoyed among followers of the *Marumakkathayam* Law. The decision proceeded on the authority of two decisions of their Lordships of the Judicial Committee, which laid down that the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor. As pointed out in the judgment of one of the Judges who made the reference to the Full Bench, the presumption was arrived at in consideration of what were known to be the notions and wishes of persons in the position of the donor and also of the ordinary incidents of property in the district. This view was accepted by the Full Bench of four Judges two of whom, Muthuswamy Aiyar and Wilkinson, JJ., were well acquainted with Malabar, and that it was well founded is suggested by the fact that the decision has not only been accepted, but has been given a considerable extension in the neighbouring State of Travancore, as pointed out during the argument by my learned brother speaking from his experience as Chief Justice of that State. It has also been followed, as I shall show, in numerous cases in this Court, and was not questioned before *Ummanga* v. *Appadorai Patter* (16), a decision of Sir Arnold White, C. J., and Sankaran Nair, J., in 1910 and it may be taken that many transactions have proceeded on the footing that it was correct. In these circumstances, notwithstanding the respect which I feel for the opinion of Sankaran Nair, J., especially in a matter affecting his own community, I think we should be very slow to differ from the decision of the Full Bench unless we are absolutely obliged to do so, more especially as that decision merely relates to a presumption which it is always in the power of a donor to negative, if so minded, by express provision. If any change is to be made it should, it seems to me, be made by the Legislature.

As regards the authorities, the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) was not only not questioned but, as pointed out in subsequent cases, was accepted in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (7), to which Sankaran Nair, J., was a party. It was followed in *Patattheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji* (9), *Mooriyat Puttikayil Kuntimina* v. *Mooriyat*

(15) (1903) 25 All. 236=30 I.A. 94 (P.C.).

(16) (1911) 34 Mad. 387=5 I. C. 671.

Patikayil Kuntambi (13), *Katankandi Kona* v. *Thamburan Kandi Sivasankaran* (11), *Chakkantavida Chakkan Abdulla* v. *Thazath Chekkootti* (12) and *Parvathi Kattilammah* v. *Ramachandra Ejaman* (14). Lastly in *Kalliani Amma* v *Govinda Menon* (17), which was subsequent to *Ummanga* v. *Appadorai Patter* (16), it was again accepted and acted on by Abdur Rahim and Sundara Aiyar, JJ., in a careful judgment in which all the authorities were examined. In this state of things it seems to me that it is not now open to us to question the decision of the Full Bench, even if we saw reasons to doubt that it had been correctly decided. With reference to the observations of their Lordships of the Judicial Committee in *Jogeswar Narain Deo* v. *Ramachandra Dutt* (3), which are referred to by Sankaran Nair, J., that the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcenary between members of an undivided family, it may be observed that these observations of their Lordships were made with reference to ordinary Hindu Law and not to the peculiar *Marumakkathayam* system, which was not under their Lordships' consideration. But even taking them to be applicable, I cannot see how a gift to a female and all her descendants in the female line can be held to infringe the principle, for that is the kind of joint family known to the *Marumakkathayam* system. On the other hand, the propriety of such a gift would appear to be recognised by their Lordships in *Rai Bishen Chand* v. *Musammat Asmaida Koer* (18) in the passage cited by Benson and Sundara Aiyar, JJ., in *Meda Vengamma* v. *Mitta Chellumiah* (19). The question whether a gift with the incidents of *tarwad* property could be made to the mother and some of her issue only, *viz.*, those by a particular husband, does not arise in this particular case, as the gift is to the childern of the donor by a deceased wife and it is not suggested that she left any other children. It is, therefore, unnecessary to express any opinion on this point, or to refer to the authorities which are collected in the judgment of Benson and Sundara Aiyar, JJ., just mentioned.

(17) (1912) 35 Mad. 648=12 I. C. 492.
(18) (1884) 6 All. 560=11 I. A. 164.
(19) (1913) 36 Mad. 484=15 I. C. 17.

Following the decision of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) and the course of subsequent decisions I would answer the question in the reference as follows: (1) The presumption is that the donees take the property, with the incidents of *tarwad* property including those mentioned. (2) Persons subsequently born into the *tavazhi* are entitled to be maintained, but not to claim partition. (3) An individual cannot alienate his share, nor can it be attached and sold in execution of a personal decree against any of the members.

Sadasiva Aiyar, J.—I am prepared to follow the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1), which is in conformity (so far as I find) with the views universally held by the communities following the ordinary *Marumukkathayam* Law, and with the intentions of a father (who might even belong to a *Marumakkathayam* community) who consorts with a lady belonging to a *Marumakkathayam* community and who makes or arranges a gift to his children born of his said *Marumakkathayam* wife.

The objection, based on the rule of perpetuity, to the validity of such gifts has been considered elaborately by Sundara Aiyar, J., in *Meda Vengamma* v. *Mitta Chellamiah* (19), and I respectfully agree with his opinion that that rule cannot be applied so as to defeat gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property, or to the whole of a group of persons following the natural law of *Marumakkathayam* forming a natural *tavazhi* group.

The objection based on the woman (whose husband makes a gift to his children by her) marrying another husband and begetting other children to the latter and on these children also belonging to her *tavazhi* along with her children by the 1st husband is not, in my opinion, insuperable. The result of that state of facts will only be that there will be two separate groups in the same *tavazhi* holding separate *tavazhi* property, the senior male in each *tavazhi* group being the *karnavan* of that *tavazhi* group. For instance, take the case of a woman and her children who form a *tavazhi* within a *tarwad*. Two of her daughters might form two different groups in the same *tavazhi* and their respective husbands might give properties

to their respective children. Then, all these children would belong to the *tarwad* of their great-grandmother, would again belong to their grandmother's *tavazhi* and would also belong to the groups or sub-*tavazhis* of their respective mothers and hold those respective group properties separately. Just as there can be *tavazhis* within a *tavazhi*, there can be group-*tavazhis* and sub-*tavazhis* in the same *tavazhi*. If two groups or sub-*tavazhis* springing from two daughters who from a *tavazhi* can have separate sub-*tavazhi* properties, there is nothing startling in two branch *tavazhis* springing from the same lady (through her marrying two successive husbands) and holding separately their respective branch *tavazhi* properties. A *tavazhi* consists, no doubt, of the descendants of a single woman (I do not think that it includes the woman herself etymologically) but there is nothing to prevent the existence in that same *tavazhi* of two groups each of which *might form a separate unit for the purpose of holding particular properties* as if it was a separate *tarward* and with the incidents of *tarward* property. It cannot be said to be an unnatural separation between the two groups, unnatural in the sense of repugnance to the habits, practices and sentiments of the community. I agree to the answers proposed by my Lord.

Srinivasa Aiyangar, J.—In India it is not uncommon for groups of persons, though not incorporated, to hold properties as if they were corporate entities. Castes and sub-castes hold property as such, so also village communities. But the more common and familiar instances of such groups in Southern India are the joint Hindu family governed by the *Mitakshara* Law, the Nambudri Illom governed by the *Makkathayam* Law, the Nayar *tarwad* governed by the *Marumakkathayam* Law, and the Aliyasantan family of South Canara. The Moplas of North Malabar generally follow the *Marumakkathayam* system and the parties to this suit are governed by that law. The incidents of such group holding are now well settled. In the case of Malabar *tarwads* such incidents include the impartibility of the property, the right by birth of persons born in the *tarwad*, and the management of the properties by the senior male member of the *tarwad*, who is styled the *karnavan*.

The constitution of a *Marumakkathayam tarwad* is well known and is concisely stated in the extract from the report of the Malabar Marriage Commission printed at page 76 in I. L. R. 24 Madras [*Thiruthipalli Raman Menon* v. *Variangattil Palisseri Raman Menon* (20)]. The constitution of a joint Hindu family governed by the *Mitakshara* Law furnishes a very close parallel [see the description of such a family by Bashyam Iyangar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (21)]. These groups cannot, of course, be created by agreement of parties. The *tavazhis* or the subordinate groups constituting the *tarwad* are, I think, capable of holding properties as corporate units with the incidents of *tarwad* property, at the same time retaining their joint interest in the properties of the main *tarwad*, just as branches and sub-branches in a *Mitakshara* joint Hindu family are capable of holding properties with the incidents of joint Hindu family property. I am also of opinion that some only of the members of a *tavazhi* cannot form a corporate unit capable of holding property as such. The husbands of the female members and the children of the male members of a *tarwad* are not members of the *tarwad*. It is not uncommon for them to make gifts of properties to their wives, daughters or sisters and their children, and such properties are called Puthravakasam properties. The question is whether, in the absence of express words in the grant, the *tavazhi* holds them as a corporate unit with the incidents of impartibility and right by birth, or whether the members of the *tavazhi* hold the property as co-owners *i.e.*, as tenants-in-common. I think these are the only two alternative views possible, and the second and third views mentioned in the referring order of Sankaran Nair, J., may be left out of consideration [*Jogeshwar Narain Deo* v. *Ram Chandra Dutt* (3)]. This question was answered by a Full Bench of this Court in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1), and the answer was that such properties were held with the incidents of *tarwad* property. The basis of the decision was that was the usual mode of holding property by persons governed by *Marumakkathayam*

(20) (1901) 24 Mad. 73=27 I.A. 231 (P.C.).
(21) (1902) 25 Mad. 149.

Law ; and that the donors presumably intended to benefit not merely the existing members of the family, but also those who may thereafter be born in the family. This decision was followed in a large number of cases in this Court, *viz.*, *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (7), *Pattatheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji* (9), *Mooriyat Putikayil Kuntimina* v. *Mooriyat Patikayil Kuntambi* (13), *Katankandi Kona* v. *Thamburan Kandi Sivasankaran* (11), *Chakkantardia Chakkan Abdulla* v. *Thazhath Chekootti* (12), *Parvathi Kattilammah* v. *Ramachandra Ejaman* (14), *Kunhi Raman* v. *Kunhi Parvathi* (22) and *Kalliani Amma* v. *Govinda Menon* (17).

For the first time, in *Ummanga* v. *Appadorai Patter* (16), a suggestion was made that if a *tavazhi* had not become a distinct *tarwad* by division or relinquishment of its joint interest in the properties of the main tarwad, the property held by that *tavazhi* will not have the incidents of *tarwad* property ; and the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) was explained as deciding only that the interest of a member of such a *tavazhi* lapsed to the other members of the *tavazhi* if that interest has not been alienated during his life-time. With the greatest respect to the learned Judges I am unable to accept this explanation. It ignores the fact that in properties held with the incidents of *tarwad* property no individual member has an alienable interest. It is to be observed that Sankaran Nair, J., who was one of the Judges who decided that case, at that time seems to have been of opinion that it is only in cases where a *tavazhi* becomes a distinct *tarwad* by ceasing to have any interest in the properties of the main *tarwad*, that it can hold properties with the incidents of *tarwad* property ; but in the order of reference the learned Judge concedes that the rule would apply even in cases where the *tavazhi* retains its interest in the properties of the main *tarwad*, provided that the members of the *tavazhi* live separately from the other members of the *tarwad*. He thinks that the case of *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) was a case of that sort. In any case, he thinks that decision should not be extended to *tavazhis* whose members do not live separately with a separate *karnavan* of their own. In the Full Bench case of *Kunhacha Umma* v. *Kutti Mammi Hajee* (1), so far as one can gather from the report, the *tavazhi* do not seem to have been living separately with a separate *karnavan* of their own. In many of the cases which followed the Full Bench decision, the members of the *tavazhi* do not appear to have lived separately with a separate *karnavan*. I am unable to see how the fact of separate living by the members of a *tavazhi* without a separation in interest can possibly affect the capacity of the *tavazhi* to hold property or the incidents of the property held by them as such *tavazhi*. In *Krishnan Nair* v. *Damodaran Nair* (23), a Full Bench of this Court decided that where a female member of a *tavazhi* dies, her separate property is inherited by her *tavazhi* as such, *i. e.*, as a corporate unit. Though in *Govindan Nair* v. *Sankaran Nair* (10), it was held by two Judges of this Court, a third judge dissenting, that the separate property of a male member of a *tavazhi* on his death lapses to the *tarwad* and not to the *tavazhi*, the opinions collected in the referring order in that case show clearly the consciousness of the people that the *tavazhi* was a separate entity which ought to inherit the property of both the male and female members of that *tavazhi*. In a case where the *tavazhi* succeeds to the property of a deceased member, that property will be managed, I assume, by the senior male member of that *tavazhi* and the members of that *tavazhi* will have the additional advantage of participating in the income of that property. I see no difficulty in the *tavazhi* holding the properties to which it succeeded with the incidents of *tarwad* property.

Two points are taken by Sankaran Nair, J., in the order of reference. *One*, that a *tavazhi* which has not separated itself in the sense mentioned above cannot cease to be under the control of the *karnavan* of the *tarwad* and cannot have a *karnavan* of its own; and the *other*, that a *tavazhi* may consist of children of different fathers. In *Koroth Kutti Amman Kutti* v. *Perungottil Appu Nambiar* (7) Moore and Sankaran Nair, JJ., had no

(22) (1910) 8 I. C. 367.

(23) (1915) 38 Mad. 48=17 I. C. 769.

difficulty in holding that Puthravakasam property held by a *tavazhi* was held with the incidents of *tarwad* property, though the mere gift of property to a *tavazhi* did not constitute them a distinct *tarwad*. In *Kalliani Amma* v. *Govinda Menon* (17), all the previous cases were considered by Abdur Rahim and Sundara Aiyar, JJ., and the relation of the senior male member of a *tavazhi* managing the properties of the *tavazhi* to the other members of the *tavazhi* was indicated. They say: "there can be no doubt that he cannot have all the rights of a *karnavan* over the junior members of his *tarwad*. He is not their guardian and has no right of supervision or control over them. He is not responsible for their protection, eduction or maintenance. His right is confined to the management of the special property owned by him and the other members of his branch." I do not think that a *tavazhi* is not a separate *tarwad* with a separate *karnavan* of its own is an impediment to their holding property with the incidents of *tarwad* property. As regards the second point there is, of course, the possibility of a woman to whom properties are given by one husband marrying another and having children by him. All the children of that woman would form members of her *tavazhi*. It is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely. After all the rule is one of construction and even if the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) is open to question (I think it is not), we ought not to depart from it after it has been followed for such a long time.

It is now necessary to notice another contention of Mr. Ramachandra Iyer which does not seem to have been put forward before the referring Judges. He contends that no gift or grant of property can be made to a *tarwad* so as to enable it to hold that property with the incidents of *tarwad* property; such a grant, he contends, amounts to a grant in favour of unborn persons and, therefore, contrary to the decision of the Privy Council in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (24). I understand him to concede that a *tarwad* could purchase properties and hold them with the incidents of *tarwad* property. If they can do that, I do not see why they should not take a gift and hold the properties with the incidents of *tarwad* property. The fallacy underlying the argument is that the grant is a grant made in favour of unborn persons. The gift is made to the entity which is called the *tarwad* or *tavazhi* and the law governing the parties regulates the mode of succession and enjoyment. Mr. Ramachandra Iyer relied on a *dicta* of the Bombay High Court in *Bai Dewali* v. *Patel Bachardas* (25) and on a case, *Kishori Dubain* v. *Mundra Dubain* (26). There is nothing in the Allahabad case to support his contention, and the passage in *Bai Dewali* v. *Patel Bachardas* (25) is only an expression of doubt. On the other hand, the decision in *Meda Vengamma* v. *Mitta Chellamiah* (19) supports the contrary conclusion.

My answer to the *first* question is that it is not the giving of properties by a person to his wife and children that constitutes them a *tarwad* or *tavazhi*, but that if properties are given to a wife and children following the *Marumakkathayam* Law, they as a *tavazhi* hold those properties with the incidents of *tarwad* property, and the right of management of the properties is vested in the senior male member of that *tavzhi*.

I answer the first part of the *second* question in the affirmative, and second part in the negative.

I answer the *third* question in the negative.

S.N./R.K.

Reference answered.

(24) (1872) 18 W. R. 359=3 Sar. 85 (P. C.).

(25) (1902) 26 Bom. 445.

(26) (1911) 33 All. 665=10 I. C. 565.

A. I. R. 1916 Madras 402

SADASIVA AIYAR AND NAPIER, JJ.

Official Assignee of Madras—Appellant.

v.

Bangy Abdul Razack Sahib and *others*—Respondents.

Second Appeal No. 92 of 1913, decided on 23rd February 1915, from the order of Bakewell, J., dated 25th September 1913.

Presidency Towns Insolvency Act (3 of 1908), S. 56 – Sale held not to be in good faith under S. 56.

Where a sale was made for a price appreciably lower than the real value of the property and the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and where he conspired with the vendor to assist the vendor to defraud or delay other creditors.

Held, that the vendee was not a vendee in good faith within the meaning of S. 56 that the sale was void as against the Official Assignee.

[P. 403, C. 1.]

M. K. Ramaswami Aiyar—for Appellant.

M. A. Tirunarayana Chariar and *Short* and *Bewes & Co.*—for Respondents.

Sadasiva Aiyar, J.—The only question in this appeal is whether the sale-deed for Rs. 7,000 executed by the insolvent to his father-in-law, who is now represented by the respondents, can be upheld as against the Official Assignee. In other words, the question is whether Abdul Kadir, the vendee, was a "purchaser in good faith and for valuable consideration" within the meaning of S. 55 of the Insolvency Act. If the sale was made for an adequate price and if further the vendor's debt, which was discharged out of the purchase-money, was equal to or nearly equal to the value of the property, I am not disposed to treat the transaction as fraudulent, or to hold that the vendee is not a vendee in good faith. If, however, the sale was for a price appreciably lower than the real value of the property and if there are facts indicating that the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor or that he conspired with the vendor to assist the vendor to defraud or delay other creditors, then the vendee cannot be treated as a vendee in good faith.

The Rs. 7,000 purchase money is made up of Rs. 5,817 and odd due by the insolvent to the vendee on prior dealings and a sum of Rs. 1,150 alleged to have been paid in cash to the insolvent. Though the sum of Rs. 1,150 was paid before the Registering Officer, I think that it was a sham payment as the insolvent's books do not contain any entry about the payment of this Rs. 1,150 and the entries in the account books of the vendee contain suspicious recitals as to the source from which the Rs. 1,150 was obtained for payment before the Sub-Registrar. Having also in view the relationship of the parties, I am unable to agree with the learned trial Judge that the sum of Rs. 1,150 was really paid to the insolvent. If, however, the value of the property was only Rs. 7,000, which is the price mentioned in the sale-deed, it may be that, notwithstanding the failure to pay Rs. 1,150 the transaction might be upheld as there *was consideration for the sale* to the extent of nearly Rs. 6,000. But on the evidence of the plaintiff's 6th witness which I see no reason to disbelieve, I am satisfied that the value of the properties sold, excluding the six shops, was about Rs. 13,000 and adding the value of the shops, the total value of the properties sold was about Rs. 14,000 just double the price mentioned in the sale-deed. I am unable to agree with the learned Judge that Rs. 7,000 was fair price, because the sale was in the nature of a forced sale. There is nothing to show that the insolvent could not have sold the properties for more than Rs. 7,000 or that there was such pressure placed by his father-in-law on him that he was obliged to part with these properties at such a great loss to himself.

The conduct of the insolvent, from a few days before the date of this sale till he was adjudicated an insolvent in May 1910, also clearly indicates his intention to keep his properties out of the clutches of his other creditors and to defraud his other creditors.

Of course, it might be said that though the insolvent might have had a fraudulent intention, the vendee is not a stranger to the insolvent and the probabilities are that the vendee and the vendor were acting together in collusion to defraud the other creditors.

Following the principles laid down in the case of *Chidambaram Chettiar* v. *Sami Aiyar* (1), I would hold that the sale was wholly void as against the Official Assignee and I would set aside the judgment of the learned judge and declare accordingly in favour of the Official Assignee, who is entitled to get his costs in both Courts from the respondents. This order is of course without prejudice to the respondents proving their claim as

(1) (1907) 30 Mad. 6.

unsecured creditors in respect of the moneys due to Abdul Kadir by the insolvents.

Costs to be on the original side scale certified for two Counsel.

Napier, J.—I concur.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 404

SPENCER AND TYABJI, JJ.

Thiruvatiyil Vattath Kunchu Menon—Defendant—Appellant.

v.

Vishnu Barathikal—Plaintiff—Respondent.

Second Appeal No. 256 of 1913, decided on 8th December 1914, against the decree of Dist. Judge, South Malabar, in Appeal Suit No. 944 of 1910.

(a) Malabar Compensation for Tenant's Improvements Act (1 of 1900), Ss. 3 (3), 4—Net annual value increased since mortgagee's possession—Presumption is that increased by improvements.

Where the net annual value of a mortgaged land has increased since the mortgagee came into possession, it may be inferred that it was due to such works or products of works as are referred to in Ss. 3 (3) and 4 unless referable to some other cause. [P. 404, C. 2.]

(b) Malabar Compensation for Tenant's Improvements Act, S. 9—Proof of effecting improvements must be given to claim compensation.

To entitle a person to compensation for improvements under S. 9 he must show that either he or his predecessors-in-title effected the improvements. [P. 404, C. 2.]

J. L. Rosario and *K. Govinda Marar*—for Appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*—for Respondent.

Judgment.—The questions involved in this appeal arise out of the operation of S. 9 of the Malabar Compensation for Tenants' Improvements Act, 1900.

The first point taken before us was that the District Judge has erred in assessing the amount of the compensation payable for the lands marked A to I series in the Commissioner's plan and that this error arose from his erroneous finding as to the genuineness of Exhibit XXIX. The judge has considered all the reasons for and against the genuineness of Exhibit XXIX in paragraph 2 of his judgment and though all his reasons may not commend themselves to us we cannot reconsider his finding of fact, as we are unable to say that there were no grounds on which he could have come to the conclusion that Exhibit XXIX was not genuine. We consider ourselves bound by the finding that Exhibit XXIX was not genuine and cannot reconsider it.

Next it was argued for the appellant that the Judge has not approached the question of the valuation of the improvements on the said lands in the manner required by S. 9 of the Malabar Compensation for Tenants' Improvements Act. We agree with this contention. Though the Judge has carefully considered the evidence, we see great difficulty in extracting any finding out of the learned Judge's consideration of this question in paragraph 2 of his judgment and must ask him to return findings on the following questions:—

(1) Whether the appellant or his predecessors-in-title have effected any improvements on the lands A to I series?

(2) If the first question is answered in the affirmative, then what compensation is due to the appellant for the improvements effected by the appellant or his predecessors-in-title?

We wish to draw the attention of the learned Judge to the terms of S. 9. In doing so we desire to point out that in a case like the present, where the mortgagee has been in occupation since 1845, if it is shown that the value of the net annual produce of the holding has in fact increased since the mortgagee came into possession, it may be inferred that the increase is owing to such works or products of works as are referred to in S. 3 (3) and S. 4 of the Act, unless it appears that the increase in the value of the produce is referable to some other cause. The inference need not necessarily be drawn in every case, but there may be cases where it would not be proper to insist on the tenant proving definitely the exact time when the improvements were made.

The third point taken before us on behalf of the appellant was that there is no proper finding on the question, what

compensation the appellant is entitled to receive in respect of the lands L and P series. This question is dealt with by the learned District Judge in paragraph 3 of his judgment. His finding might, it is true, have been more explicit and might have had more direct reference to the point actually arising for decision, *viz.*, what the present yield of the lands is. We are unable to say, however, that he has not found as a fact that the present produce of the land is the same as it was at the time of Exhibit XIV. We will, therefore, accept that finding.

There are cross-objections against the District Judge's decision. One of these refers to the compensation for the timber trees allowed under S. 10 of the Act. It is argued that by the terms of Exhibit A the appellant is prevented from claiming any compensation and that Exhibit A is not precluded from having operation with reference to the timber trees by reason of S. 19 of the Act, as S. 19 refers to *making* improvements and it cannot be said that the improvement caused by the spontaneous growth of trees is *made* by the tenant. It is unnecessary to express any opinion as to the suggested construction of S. 19, as we are of opinion that Exhibit A must be construed as offering no restriction to the right to claim compensation in respect of timber trees. The words of Exhibit A relied upon by the respondent, when they are read with the preceding portions of Exhibit A, seem to us to mean that the provisions about the compensation for improvements contained in Exhibit A shall not apply to trees. There is no agreement that trees shall not be compensated for at all.

Next it is contended that the compensation of 250 *fanams* referred to in paragraph 3 of the District Judge's judgment ought to be disallowed, as it refers to improvements on lands already fully compensated for by the decree. It is argued on the other hand that these 250 *fanams* were allowed in respect of improvements on items J and K in respect of which no other compensation is allowed. We are unable to say whether it is so and we will ask for a finding on the following question :—

(3) In respect of what lands is the compensation of 250 *fanams* referred to in the District Judge's judgment, paragraph 3, allowed?

The findings should be submitted within six weeks from the re-opening of the District Court after recess : ten days will be allowed for filing objections.

[In compliance with the order contained in the above judgment the District Judge of South Malabar submitted a negative finding on the first issue and on the third issue found that the compensation of 250 *fanams* is allowed for the lands A to I series.

This second appeal and the respondent's memorandum of objections coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following]

Judgment.—We accept the findings and dismiss the second appeal and the memorandum of objections with costs. Time for redemption is extended to six months from this date.

S.N./R.K.

Appeal and Memo. of objections dismissed.

A. I. R. 1916 Madras 405

SADASIVA AIYAR AND TYABJI, JJ.

Buchi Saravagarudu Garu—Appellant.

v.

Kovvuri Venkata Raju and *others*—Respondents.

Second Appeal No. 1376 of 1912, decided on 1st August, 1913, from the decree of Dist. Judge, Godavari, in A. S. No. 260 of 1910.

(a) Madras Estates Land Act (1 of 1908), Landlord failing to show a Ryoti land to be waste land—It must be held to be Ryoti other than old waste.

A piece of land, which was clearly *ryoti* land on the date when the Madras Estates Land Act came into force, but which the landlord was unable at that time to prove to be "old waste" under either of the sub-clauses of S. 3, must be held to have then been *ryoti* land other than old waste. [P. 406, C. 1.]

(b) Madras Estates Land Act (1 of 1908), (Amended Act 1909), S. 153—Clause added to S. 153 applies to non-occupancy ryots coming under S. 6.

The clause added by the amending Act of 1909 to S. 153 applies only to non-occupancy *ryots* included in S. 6, clauses 3, 4 and 5 of the Act. [P. 406, C. 2.]

G. Venkatramiah—for Appellant.

B. Narasimha Rao—for Respondents.

Sadasiva Aiyar, J.—S. 23 of the Madras Estates Land Act says that a land "shall be presumed to be *ryoti* land *other than old waste*" until the contrary is proved. The important question in issue in this case is whether the plaint land is *ryoti* land coming under the definition of old waste or *ryoti* land not coming under the definition of "old waste." For, if it was not "old waste," S. 6 gives the *ryot* in possession on the date of the passing of the Act an occupancy right in the land; and this suit by the landlord (appellant before us) in ejectment was rightly dismissed by the lower Courts. Old waste is defined in S. 3, clause 7. Clause 7 contains two Sub-clauses 1 and 2. The plaint land admittedly does not come under sub-clause (1). As regards sub-clause (2), there are two parts in it. The land in question does not come under the description of the land in the second part, that is, land in respect of which an ejectment decree aginst the *ryot* has been obtained before the coming into force of the Act. As regards the first part of sub-clause (2), it refers to a land which has remained without occupancy rights being held therein at any time within a period of not less than ten years immediately prior to letting by the landholder after the passing of the Act. To find out whether a land was "old waste" or not *at the time of the passing of the Act*, a definition which says that a land shall be considered as old waste at the time of a letting after the passing of the Act, if certain conditions are then fulfilled, cannot be resorted to, because S. 6 applied at once on the passing of the Act, and when once occupancy rights are vested in a *ryot* at the time of the passing of the Act, the land ceases to be old waste.

Hence, it seems to me, that the plaint land, which was clearly *ryoti* land (that is, cultivable land other than private land according to the definition in S. 3 clause (16) on the date of the coming into force of the Estates Land Act and which land the landlord could not then prove to be "old waste" under either of the sub-clauses of S. 3, must be held to have then been *ryoti* land other than old waste. If so, the defendant got a right of occupancy then under S. 6 and could not be ejected thereafter.

As to the argument that the addition made to S. 153 by the amendment Act of 1909, namely, "nothing shall affect the liability of a non-occupancy *ryot* to be ejected on the ground of the expiry of the term of a lease granted before the passing of this Act," that this addition would become useless if all non-occupancy *ryots* in possession got occupancy rights on the passing of the Act, there are certain kinds of non-occupancy ryots included in S. 6 clause 3, 4 and 5 of the Act, who do not obtain occupancy rights even if they were in possession on the date of the coming into force of the Act. The additional clause inserted by the amending Act in S. 153 would apply to such lands. On these grounds, I would dismiss this second appeal with costs.

If the land was "old waste," S. 157 of the Act, as interpreted in *Chaganti Atchaparazu* v. *Yelugoti Krishna Yachandrulavaru* (1) will bar this suit. But it is unnecessary to base my decision on that ground, as the correctness of that decision has been attacked in the arguments before us.

Tyabji, J.—The plaintiff prays for an order of ejectment against the defendant, his tenant; the tenant alleges, on the other hand, that he is a *ryot* in possession of the land at the date when the Madras Estates Land Act came into operation, having been admitted by the plaintiff into the possession of the land which he alleges is *ryoti* land not being old waste and on this ground the defendant contends that he has the right of permanent occupancy in his holding. The first question, therefore, we have to decide is whether the land is *ryoti* land not being old waste. The defendant relies upon S. 23 of the Madras Estates Land Act which raises the presumption that any land, the nature of which it is necessary to determine, is *ryoti* land other than old waste, until the contrary is proved. The onus, therefore, is on the plaintiff to establish that the land in question is old waste land. He seeks to do so by establishing that the land falls within the terms of S. 3, sub-S. 7, clause (2). That clause, according to the learned Pleader for appellant, is applicable to the facts of this case, his contention being that the land in question is old waste because at the time of the taking of the land in 1909 by the land-

(1) (1913) 19 I. C. 225.

holder it had remained without any occupancy rights being held therein within a continuous period of 10 years namely, from 1899 to 1909. It is admitted by the respondent that up to 1904, the land in question was not subject to any occupancy rights ; and that it had been let to tenants under leases of varying terms the last of which expired in 1904. In that year, the present tenant obtained a lease for five years and took possession of the land under his lease. It is also admitted that, up to the time when the Act came into operation, namely, 1st July 1908, the land was not subject to any occupancy rights : but the respondent contends that on the 1st July 1908, while he was in occupation of the land in question, it became impressed with occupancy rights by the operation of the Act and he relies on S. 6 for this contention. The question, therefore, at this stage is whether the land was impressed with occupancy rights on the 1st July 1908 by reason of the provisions of any section of the Act.

Now, S. 6, on which reliance is placed by the respondent, does not deal directly with the question in what way occupancy rights may be acquired in lands which up to the coming into operation of the Act were without occupancy rights. Nor does it say in what way lands such as would come within the description of 'old waste' may be turned into *ryoti* land. But the section proceeds on the assumption that the lands, to which it appears, are *ryoti* lands not being old waste. It is, therefore, to my mind rather unsatisfactory that when we have to determine the question whether the particular piece of land, which at one time was not subject to occupancy rights, became subsequently impressed with such rights, we should fall back upon a section which deals with land, which *ex hypothesi* is subject to occupancy rights. I feel constrained, however, not without a great deal of hesitation, to come to the conclusion that in such a case also the person claiming that the land is old waste must affirmatively establish that the land in question comes within the definition of old waste contained in some provision of the Act such as S. 3, sub-S. 7, clause 1 and as a consequence must, if necessary, prove that there are no occupancy rights in the land. I come to this conclusion on a consideration of the presumption raised under S. 23 and the definition contained in S. 3, clause 16 of *ryoti* land together with the provisions of S. 3, clause 7, relating to the definition of old waste.

Turning then to the definition of old waste in S. 3 (7) and to the means which are provided in it for establishing that any land is old waste after the Act came into operation, it is admitted that the plaintiff has not obtained a final decree of a competent Civil Court establishing that the *ryoti* has no occupancy right before the passing of the Act. It is also admitted that the land in question was not possessed by the landholder or his predecessor-in-title for a continuous period of not less than 10 years. Nor has it continuously remained uncultivated during that time so that the two modes of affirmatively establishing that the land is old waste, which are referred to in the 6th clause of S. 3, cannot avail the plaintiff. It follows that the lower Courts have not erred in holding that it was for the plaintiff to establish that the land in question was old waste and that they had not succeeded in discharging their burden. For these reasons, I agree that this appeal must be dismissed with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 407

WALLIS, C. J. AND COUTTS-TROTTER, JJ.

In re *Abibulla Rowthan* and *others*—Accused—Appellants.

Criminal Appeal No. 90 of 1915, decided on 29th April, 1915, against the order of Sub-Judge, Trichinopoly, in Case No. 7 of 1915.

Criminal P. C. (5 of 1898), S. 342—No case made out—Accused cannot be examined and his statement cannot be used in subsequent trial.

Where no evidence has been given implicating the accused, the Magistrate has no right under the Statute to put questions to him or invite him to make a statement. A statement, therefore, made by the accused under these circumstances is not admissible evidence against him on his subsequent trial. 27 Mad. 238; *Reg.* v *Berriman*, 6 Cox. C. C. 388, Foll. [P. 408, C. 1.]

Sec. 342 gives the Manistrate only the right to question the accused for the purpose of enabling him to explain any circumstance appearing in evidence against him. [P. 408, C. 1.]

Swaminadhan—for Appellants.

C. Sidney Smith—for the Government.

Judgment.—There was no evidence before the Sessions Court against accused Nos. 2, 6 and 7 other than their own admissions in the Court below and the Sessions Court itself. The admissions in the Court below were made in answer to an invitation from the Committing Magistrate to say what they had to say. At the time when these statements were made in the Court of the Committing Magistrate the prosecution had given no evidence at all involving any one of these accused, as appears from an examination of the record of the evidence given in that Court. S. 342 of the Code of Criminal Procedure only gives the Magistrate the right to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him. We think that where no evidence has been given implicating the accused, the Magistrate has no right under the Statute to put questions to the accused or invite him to make a statement. We further think that if a statement is made by the accused in such circumstances, it is not admissible evidence against the accused on his subsequent trial. This is in agreement with the decision of White, C. J., in *Mohideen Abdul Kadir* v. *Emperor* (1) and the same principle was applied by Erle, J., in *Reg.* v. *Berriman* (2) to a statement elicited from a prisoner improperly questioned by an examining Magistrate in England. The same objection applies to the answers elicited from the accused by the learned Judge at the trial; and we feel constrained to say that the learned Judge subjected the accused to a cross-examination which far outstripped anything enjoined or permitted by S. 342 of the Code. We set aside the convictions of accused Nos. 2, 6 and 7.

With regard to the 4th accused, there is some evidence against him, but it is practically the word of Prosecution Witnesses Nos. 1 and 2 against that of the 4th accused. The surrounding circumstances throw no light on the probabilities of the matter and we do not think it would be safe to convict on the evidence of two interested persons. We set aside this conviction and sentence also.

S.N./R.K.

Appeal allowed.

(1) (1904) 27 Mad. 238=2 Weir 408.
(2) (1852-1855) 6 Cox. C. C. 388.

A. I. R. 1916 Madras 408

KUMARASWAMI SASTRI, J.

In re *S. Kuppuswami Aiyar*—Accused—Petitioner.

Criminal Rev. Case No. 667 of 1914 and Criminal Revn. Petn. No. 565 of 1914, decided on 26th March 1915, against the order of 2nd Class Magte., Tranquebar, dated 29th July, 1914, in Calender Case No. 229 of 1914.

(a) Letters Patent (Madras), Cl. 15—High Court can interfere at any stage.

A High Court has jurisdiction to interfere at any stage of the proceedings if it considers that, in the interests of justice, it should do so. [P. 409, C. 2.]

(b) Penal Code (45 of 1860), S. 189—There must be intention to prevent public servant.

Before an offence under S. 189 can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function. [P. 410, C. 1.]

(c) Penal Code (45 of 1860), Ss. 189 and 504—Merely abusing process-server does not constitute offence under Ss. 189 or 504.

The mere fact that the accused abused the process-server will not constitute an offence under S. 189, nor will it constitute an offence under S. 504 without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely to result. [P. 410, C. 2.]

(d) Civil P. C. (5 of 1908), O. 5, R. 10—Refusing to sign original does not affect validity of service.

Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference. [P. 410, C. 1.]

(e) Civil P.C. (5 of 1908), O. 5, R. 9—Process-server is entitled to enter house without permission.

The fact of a subpœna being entrusted to a process-server does not give him a general right of entry into any house without obtaining the permission of the owner or person in charge. [P. 410, C. 2.]

Public Prosecutor—for Government.

T. Ramachandra Aiyar for *R. Sadagopachariar* and *C. Rajagopala Iyengar*—for Petitioner.

Order.—This is an application under S. 435 of the Code of Criminal Procedure and S. 15 of the Charter Act, praying

that the charge framed against the petitioner by the Second Class Magistrate of Tranquebar may be quashed.

The case for the accused is that he was charged under Ss. 189 and 504 of the Indian Penal Code, that the evidence on record is insufficient to substantiate either of the charges and that the proceedings were instituted out of pure malice and with the object of harassing the petitioner.

A preliminary objection has been taken by the Public Prosecutor as to the maintainability of the petition and the power of the High Court to interfere. So far as the power of the High Court is concerned the point seems to be concluded by authority. In *Chandi Pershad* v. *Abdur Rahman* (1), it was held that the High Court had power to interfere at any stage of a case if it considers that the grounds have been made out for interference. Their Lordships at page 138 observe as follows :—"We feel bound to say that Mr. Pugh did not attempt to contend that the charges framed against Chandi Pershad could be sustained. He rather confined himself to urging the impropriety of our interference at a time when the case is still pending before the Magistrate. There can be no doubt, however, that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected for over two months to the harassment of an illegal prosecution, we think it is our bounden duty to interfere." In *Choa Lal Dass* v. *Anant Pershad Misser* (2), it was held that the Court had power to interfere in any case and at any stage and the above passage from *Chandi Pershad* v. *Abdur Rahman* (1) was approved. While admitting the general power of the High Court, their Lordships state that the interference should be rare and only in exceptional cases and that the safe practical test would be to see whether a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the Court that it is a fit case for interference at an intermediate stage. In *Jagat Chandra Mozumdar* v. *Queen-Empress* (3) the power of the High Court to interfere in any case and at any stage was referred to and their Lordships found that in cases where there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress the High Court has power to interfere. Their Lordships quashed the proceedings in the particular case, as they were of opinion that "it is clearly most unfair to the accused that he should not be called upon to rebut a charge which, upon the evidence, is baseless in so far as it affects him." In *Queen-Empress* v. *Nageshappa Pai* (4), it was held that the High Court could interfere with an interlocutory order passed by a Magistrate and Mr. Justice Ranade observed as follows :—"A preliminary objection was raised by the Government Pleader that as the proceedings before the Magistrate were still pending, this Court could not interfere with an order passed by the Magistrate in an interlocutory stage. The words used in S. 435 of the Code of Criminal Procedure are, however, very general, and empower the High Court to send for the record of a case not only when it wishes to satisfy itself about the correctness of any finding, sentence or order, but also as to the regularity of any proceedings in Subordinate Courts. In *Abdool Kadir Khan* v. *Magistrate of Purneah* (5), the High Court of Calcutta expressly ruled that it had jurisdiction to revise interlocutory orders. This power was again exercised by the same Court in respect of an illegal Municipal Prosecution—*Chandi Pershad* v. *Abdur Rahman* (1). We follow these decisions and overrule this preliminary objection urged by the Government Pleader.

There can thus be little doubt that though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that, in the interests of justice, it should do so. No hard and fast rule can be laid down as regards the class of cases in which the High Court will interfere.

In the present case the accused is charged with offences under Ss. 189 and 504 of the Indian Penal Code.

A careful consideration of the evidence adduced by the prosecution and the Exhibits filed in the case leads me to

(1) (1895) 22 Cal. 131.
(2) (1898) 25 Cal. 233.
(3) (1899) 26 Cal. 786.
(4) (1896) 20 Bom. 543.
(5) (1873) 20 W. R. 23 Cr.

the conclusion (1) that the ingredients necessary to constitute an offence under Ss. 189 and 504 have not been made out, and (2) that the case as presented to the Court bears considerable evidence of fabrication and that the development that the case has undergone from the date of the first report of the process-server dated 21st April 1914 shows that this is not a *bona fide* prosecution but that the complainant is a tool in the hands of others.

The case for the prosecution is that the accused (who is a respectable Pleader) obstructed the service of summons on his father, whom he had subpœnæd as a witness for his client. There is absolutely no motive suggested why accused should have done so and the whole story is on its face improbable.

Before an offence under S. 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function.

In the present case it is admitted that the summons was tendered to the witness before the accused appeared on the scene. Though the complainant does not stick to one story as to when the witness signed his name, there can be little doubt that he was served with the summons. I cannot help observing that the story told by the prosecution 1st witness bears considerable traces of addition and improvement if reference be made to his sworn endorsement on the complaint. The endorsement shows that summons was served in the house of the accused and that there was no threat of violence but only abuse. The whole of the story about the street scene, which is inconsistent with the version in the endorsement on the summons, is an afterthought and in my opinion false.

There is nothing to show that the accused intended to obstruct service or as a matter of fact obstructed it. Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference. R. 10 of O. 5 of the Code of Civil Procedure states that service of a summons shall be made by delivery or *tendering a copy* of a summons. If the party refuses to sign the acknowledgment, all that the process-server has to do is to affix it. R. 8 of O. 16 of the Code of Civil Procedure enacts that service of summons on witnesses shall be in manner prescribed in O. 5.

The endorsement on the summons is to the effect that after tender of summons to the witness the accused came up, abused the process-server and asked him to get out of the house and that the witness immediately afterwards received the summons and *batta* and signed his name. Assuming that accused abused the process-server, it will not constitute an offence under S. 189 of the Indian Penal Code.

As regards the charge under S. 504, mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely. There is nothing to show that the accused had any such intention or knowledge. The endorsement on the summons does not warrant any such inference.

It appears from the subpœna that it was to be served on the witness who is described as residing at No. 6, Pattamangalam Agraharam, Kasba Mayavaram. The process-server had power to enter that house in order to effect service. He, however, went inside the house of the accused in Vellalar in Koil Rettai Street without permission and the accused is said to have abused him and asked him to get out.

I do not think that the fact of a subpœna being entrusted to a process-server gives him a general right of entry into any house without obtaining the permission of the owner or person in charge. Such a general power to enter any house at any time is not given by any of the provisions of the Code and would, in my opinion, be a serious violation of private rights. The mere fact that the owner asked the process-serever to go out of his house would not be an offence. Assuming that the request to go out of the house was accompanied by the words "*Badava*, rascal", it cannot be said that the object or intention was to provoke a breach of the peace, however, improper the language may be.

The case was fully argued on both sides and giving it my best consideration, I am of opinion that this is a case where I ought to interfere. It is easy to

see what injury is likely to be inflicted on a respectable Pleader by a vexatious and protracted criminal trial. It may be that after a protracted trial the accused will be acquitted, but that does not appear to be a sufficient ground for not saving him from what I consider to be a groundless and vexatious prosecution

I quash the proceedings in the lower Court.

S.N./R.K.

Proceedings quashed.

A. I. R. 1916 Madras 411

SADASIVA AIYAR AND NAPIER, JJ.

Mahalinga Sundara Thevan—Defendant—Appellant.

v.

Krishna Thevan and *others*—Plaintiffs—Respondents.

Second Appeal No. 615 of 1913, decided on 23rd October, 1914, against the decree of Tempy. Sub-Judge, Ramnad, in Appeal Suit No. 958 of 1911.

(a) Civil P. C. (5 of 1908), S. 11—Compromise decree omitting certain relief does not operate as res judicata with respect to them if cause of action of subsequent suit had not accrued.

When a matter was not "heard and finally decided" in a suit but a decree was passed on the basis of a compromise agreement, the reliefs claimed in the plaint but not included in such a decree, should not be deemed to have been refused so far as to bar a fresh suit for the said reliefs, if the cause of action in the succeeding suit had not arisen on the date of presentation of the plaint in the prior suit. 30 Bom. 395, and 35 Mad. 75, Foll. [P. 411, C. 2.]

(b) Evidence Act (1 of 1872), S. 115—Consent decree would be estoppel if question was considered and decided—Intention determines it.

There can be an estoppel by judgment in a consent decree only when the question raised by the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. In all these cases the question is whether the parties did intend that the question at issue should be finally settled between the parties by the consent decree, and did the consent decree so actually settle that question.

[P. 412, C. 1.]

N. A. Vaidyantha Aiyar for *C. V. Ananthakrishna Aiyar* – for Appellant.

C. S. Venkatachariar—for Respondents.

Sadasiva Aiyar, J.—The contention that under the compromise arrangement in the former suit, the 2nd plaintiff's vendor transferred his right as owner to the defendant cannot be upheld. The said compromise petition merely allowed the defendant to redeem the 2nd plaintiff's vendor (first mortgagee of both items Nos. 1 and 2) and did not transfer to the defendant the rights obtained by the 1st mortgagee as the purchaser of the mortgagor's right, a purchase not binding on the defendant so far as his right to redeem the 1st mortgage was concerned. The decree also does not, in terms, convey the 1st mortgagee's interest *as such owner of the equity of redemption* to the defendant.

It is, however, argued that the 1st mortgagee ought to have insisted on the relief of the redemption of item No. 2 from the defendant being given to him in the former suit, that that relief should, therefore, be deemed to have been refused to him under Explanation 5 to S. 11 of the Civil Procedure Code and that by such refusal he and his vendee, the second plaintiff (who stands in his shoes), are barred from bringing the present suit for that relief.

This ingenious contention as *res judicata* was not set up in the written statement in the first suit, did not form the subject of any issue in the present suit and was not raised in the grounds of appeal to the lower Appellate Court. Nor do I think that any of the grounds in the memorandum of second appeal raises the question. Even if the defendant is entitled to argue it before us, I am not satisfied that when a matter was not "heard and finally decided" (see S. 11, Civil Procedure Code) in a suit but a decree was passed on the basis of a compromise agreement, the reliefs claimed in the plaint but not included in such a decree should be deemed to have been refused so far as to bar a fresh suit for the said reliefs, if the cause of action in the succeeding suit had not arisen on the date of the presentation of the plaint in the prior suit. In *Minalal Shadiram* v. *Kharsetji, Karsetji* v. *Minalal Shadiram* (1), it is said on page 408: "The lower Court was also wrong in holding that the defendant is barred by S. 13 of the Civil Procedure Code" (present S. 11) "from raising the questions of fraud or wager. . . . . In Suit No. 105 of 1897 *there was no hearing and disposal of any matter in issue and the provisions of S. 13 have, therefore, no*

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(1) (1906) 30 Bom. 395.

application. It has, however, been argued that the consent decree . . . . . operates as an estoppel by judgment. . . . . *but when the facts of the case and the wording of the Purshis,*" (that is, the application for the passing of the consent decree) "above set out, *are borne in mind, the reason and the scope of the consent decree at once become apparent.*"

The above case is quoted with approval in the judgment of this Court in *Rajah Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty* (2), and the learned Judges proceed to say: "What then is the test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise? In our opinion the answer must depend on the answer to the question 'Did the parties decide for themselves the particular matter in dispute by the compromise? and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree?' For settling this point it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree." Then at pages 85 and 86, the learned Judges say: "What the Court has to do in determining with respect to what matter each of the parties to a compromise decree is estopped, is to find out what it was that the parties *agreed to* in the previous action; and for this purpose it would not be enough merely to see what was the relief granted in the decree of the Court, but it would be necessary also to examine what was the basis on which it was granted." The present suit is not for the same relief as in the former suit (which was brought *for the redemption of item No. 2 alone* on payment of what was due to the defendant on the *second mortgage of item No. 2*) but is brought for *redemption of both items Nos. 1 and 2 on payment of what was due to the defendant on the 1st mortgage of items Nos. 1 and 2 discharged by him in pursuance of the compromise decree in the first suit and of what was due to him on the 2nd mortgage of item No. 2.* "The basis on which" the former decree "was granted" was clearly the following: that if the defendant pays up to the 1st mortgagee (the plaintiff in that case) the mortgage amount, he (the defendant) shall become the mortgagee of items Nos. 1 and 2 for that amount so paid, while remaining the 2nd mortgagee of item No. 2 alone for the 2nd mortgage amount. His own liability to be redeemed as a person holding rights as mortgagee in those two capacities after he redeems the first mortgage, was not intended to be finally decided and was not decided by the compromise decree in the former suit. It was only in case he did not pay up the 1st mortgage amount that his liability to allow the redemption of item No. 2 alone was intended to be decided, but as he did pay up the 1st mortgage, his said contingent liability under the former decree never became an actual enforceable liability under that decree. To borrow the language of Abdur Rahim and Krishnaswamy Iyer, JJ., in *Hukdar Syed Bacha Saheb* v. *Karuppanna Pillay* (3), "Does what is decided" in the former suit "involve a decision" as to the plaintiffs right after the defendant redeemed the first mortgage? No such decision negativing the plaintiff's rights as under his Court-auction purchase of the mortgagor's right is involved in the decree passed on this compromise agreement.

There is, therefore, no force in the contention that the present suit is barred on account of estoppel by the judgment or the decree in the former suit.

The second appeal fails and is dismissed with costs.

Napier, J.—I entirely concur. I agree with my learned brother that we should follow *Rajah Kumara Venkataperumal Raja Bahadur* v. *Thatha Ramasamy Chetty* (2) as correctly laying down the principles on which compromise decrees should be interpreted.

S.N./R.K.

Appeal dismissed.

(2) (1912) 35 Mad. 75=9 I. C. 875.

(3) (1910) 8 I.C. 261.

A. I. R. 1916 Madras 413

SADASIVA AIYAR AND PHILLIPS. JJ.

Muddusami Siddappa—Defendant—Appellant.

v.

Bhaskar Lakshmi Narasappa and *another*—Plaintiffs—Respondents.

Second Appeals Nos. 1058 and 1059 of 1914, decided on 17th August, 1915, against decrees of Dist. Judge, North Arcot, in Appeal Suits Nos. 424 and 425 of 1913.

(a) Hindu Law—Alienation—Widow—Alienation for husband's debts is valid—Sale for inadequate consideration will not be binding.

A Hindu widow can validly sell her husband's properties in order to discharge her husband's debts, but she cannot take advantage of the existence of a few debts to sell away her husband's properties for a less than their value in order to get ready money into her own hands. [P. 414, C. 1.]

(b) Transfer of Property Act (4 of 1882), S.53—Undue preference to one creditor by Hindu widow—Creditor cannot take benefit of fraud.

Where a widow alienates her husband's properties with the improper motive of preferring one creditor over another, that creditor is not entitled to profit by such fraud. [P. 414, C. 2.]

(c) Transfer of Property Act (4 of 1882), S.51—Transferee not *bona fide* will not get cost of improvements.

A person who cannot in good faith believe that he is absolutely entitled to the properties alienated to him is not *bona fide* transferee within the meaning of S. 51, and is not entitled to claim the value of improvements effected by him. 40 Cal. 555, Dist. [P. 415, C. 1.]

S. Srinivasa Aiyangar and *A. Swaminatha Aiyar*—for Appellant.

T. R. Ramachandra Aiyar—for Respondents.

Facts.—The plaintiffs, the reversioners of the husband of a Hindu widow, sued to recover properties alienated by her, on the ground that there was no real necessity for such sale. The alienees contended that the sale was valid because the widow is entitled to discharge her husband's debts by an alienation of his properties. The District Munsif found the sale to have been for consideration, but held under the circumstances that it was not for legal necessity. He decreed the plaintiffs' claim but allowed the defendants the value of improvements effected by them to the lands.

On appeal the District Judge of North Arcot confirmed the finding of the District Munsif with regard to necessity and disallowed the defendants' claim for improvements also. The present appeal is against that decree.

Sadasiva Aiyar, J.—The defendants are the appellants in these two connected second appeals. The suit was brought by the reversioners after the death of a Hindu widow for possession of properties improperly alienated by her to the appellants. The alienations are evidenced by the documents Exhibits XII, XIII and XIV, dated 5th February 1876.

The lower Appellate Court came to the following findings of fact :—

(*a*) Of the Rs. 1,600, the total purchase-money mentioned in these three documents, about Rs. 1,300 went towards the discharge of debts which had been incurred by the last male owner. (See Exhibits I, II series, IV series, VII, VIII and XVI.)

(*b*) Rupees 115 was due under a document, Exhibit XI, executed by the widow herself and Rs. 175 was paid in cash.

Out of the Rs. 1,300 which went towards the discharge of the husband's debts, Rs. 1,200 was due under two usufructuary mortgage-bonds and a conditional sale-deed (see Exhibits I, II and IV), which had been executed for a total principal sum of Rs. 2,100. This sum of Rs. 2,100 had become reduced to Rs. 1,200 owing to the very favourable terms contained in the two usufructuary mortgage-deeds, namely, that the usufruct of the land should go wholly in satisfaction of the principal amounts without any liability on the mortgagor's part to pay interest unless he obstructed the enjoyment of the lands by the mortgagees.

The lower Courts found that there was no necessity for selling the lands (which had been mortgaged for a sum of Rs. 1,900) for the low price of Rs. 1,000 in order to discharge debts, which were being gradually wiped out from the usufruct, that the widow's real object was not to discharge her husband's debts but to get some ready cash into her own hands, as was shown by her conduct throughout during the space of about eight years after her husband's death (such conduct including the sale even of her husband's dwelling houses), that the

defendants could not be treated as *bona fide* alienees, that is, alienees who were ignorant of the widow's real object and that, therefore, the alienations were invalid against the reversioners. The learned District Judge further disallowed the defendants' claim for compensation for the improvements made by them on the lands sold to them.

I do not think that the appellants are entitled to question in second appeal the finding of fact by both the Courts that there was no necessity for the sales made by the widow and that the defendants knew that there was no necessity.

Mr. S. Srinivasa Aiyangar, however, argued that there was, what he called, a "technical" necessity for the sales, in other words, that on the finding that there was a debt of Rs. 1,300 due by the husband's estate on the date of the sales, the widow was entitled to sell away a portion of her husband's estate to discharge that debt even though the transaction might have been imprudent. He relied on certain authorities of which I need notice only two namely Mayne's Hindu Law, paragraph 633, and the judgment in *Muthukrishnan Chetty* v. *Annapurnathachi* (1). The passage in Mayne's Hindu Law states that a Hindu widow can validly sell her husband's properties in order to discharge her husband's debts. But I do not think that the learned author intended to lay down that a widow could take advantage of the existence of a few debts to sell away her husband's properties for less than their value in order to get ready money into her own hands and while the debts were being discharged from the usufruct of the lands mortgaged for those debts. The observation in the case of *Muthukrishnan Chetty* v. *Annapurnathachi* (1) that actual demand by a creditor need not be proved to justify a widow in selling her husband's property to discharge his debt," must be read in the light of the facts found in that case, namely, that the debt was carrying interest and the principal amount of Rs. 400 had swollen to a sum of Rs. 700 by the addition of Rs. 300 on account of interest, and that "*the widow acted prudently in taking steps to discharge the debt.*" I do not think that the authorities quoted can support the alienation made by the widow in this case, namely, a wholly imprudent alienation made about 10 years after the husband's death, not with the religious motive of freeing her husband's soul in his after-death state from the burden of his debts, but with a view to get some ready cash into her own hands, the mortgage-creditors having no right to sue for their moneys. Mr. Mayne, in the same paragraph 633, relied on by the appellants' learned Vakil, says that the widow's right to pay debts by alienating the properties must be "exercised *bona fide* in discharge of the duty to pay her husband's debts" and that when she enters into transactions with the improper motive of even preferring one creditor over another, that creditor would not be entitled to profit by such fraud. On the findings of fact in this case, therefore, it seems to me that the lower Courts were justified in treating the alienations void as against the reversioners.

The *last* question to be considered relates to the appellants' right to claim improvements. The case, *Nanjappa Gounden* v. *Peruma Gounden* (2), clearly negatives the defendants' right to claim the value of improvements. Reliance was, however, placed on the Privy Council decision *Kidar Nath* v. *Mathu Mal* (3), for the contention that if the market value of the alienated properties had been raised by the improvements made by the alienees, they were entitled to claim the cost of the improvements not exceeding such increase in the market value. Their Lordships of the Privy Council had not in that case to deal with the question whether the alienees in that case were *bona fide* alienees who, within the meaning of S. 51 of the Transfer of Property Act, really believed in good faith that they were absolutely entitled to the property. The appeal to their Lordships was made by the alienee who claimed more compensation than the Indian Courts had given him and their Lordships, without calling upon the respondents, dismissed the appeal on the ground that the appellant had not been given less than he was entitled to claim. That case is therefore, no authority for the

(1) (1911) 9 I. C. 803.

(2) (1909) 32 Mad. 530=4 I. C. 18.

(3) (1913) 40 Cal. 555; 18 I. C. 946.

proposition that aperson who could not have believed in good faith that he was absolutely entitled to the property can claim the value of the improvements effected by him.

In the result I would dismiss the second appeals with costs.

Phillips, J.—I concur.

S. N./R. K.

Appeals dismissed.

A. I. R. 1916 Madras 415

SADASIVA AIYAR AND NAPIER, JJ.

Ratna Bai and *others*—Appellants.

v.

Official Assignee of Madras and *another*—Respondents.

Original Side Appeals Nos. 15 and 32 of 1914, decided on 4th February, 1915, from the preliminary order, dated 8th December, 1913, Reported in A. I. R. 1914 Mad. 238.

(a) Presidency Towns Insolvency Act (3 of 1909), S. 17—House purchased in mother's name before insolvency and mutated after in wife's name—Official Assignee claimed and applied under S. 26, Insolvency Act 1848 for possession—Insolvency Commissioner held competent to decide application—After acquired property held vested in Official Assignee from date of acquisition—Insolvent could not claim adverse possession.

One *B* was adjudicated an insolvent in 1890 and he died in July 1913 and his sons and widow were found to be in possession of a house and considerable moveable property. The house was purchased in the year 1894 in the name of his mother who died in 1897 and after her death the registry of the house was transferred in the name of his wife. The Official Assignee claimed all the said property as the self-acquired property of the insolvent and made an application under S. 26 of the Insolvency Act of 1848 for a declaration accordingly and for possession thereof. The sons and the widow of the insolvent pleaded, among other things, that the claim of the Official Assignee was barred by limitation and that the Insolvent Commissioner had no jurisdiction to try the claim on an application, but the Commissioner referred the Official Assignee to a regular suit only in regard to moveables and tried the claim as to the house.

Held, that the Insolvent Commissioner had jurisdiction to adjudicate the claim on an application as that was the only and proper procedure to be followed. [P. 419, C. 1.]

Held, further, that the after-acquired property of the insolvent vested from the date of its acquisition in the Official Assignee and it was not necessary to have a judgment entered up under S. 86 of the Insolvency Act of 1848; and that the claim of the Official Assignee was not barred by adverse possession. 18 Mad. 24, ref. to. [P. 416, C. 1.]

Per *Sadasiva Aiyar, J.*—When jurisdiction is given by Statute to a Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction, the special procedure pointed by the legislature in respect of the decision of those particular questions ought to be brought to their natural and intended conclusion by the Court which is directed to try those questions and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs. [P. 416, C. 1.]

An insolvent, from the time of his adjudication as insolvent until his final discharge, by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee. 8 Cal. 556, diss. from. [P. 417, C. 1 & 2.]

(b) Limitation Act (9 of 1908)—Applicability—Act has no application to special procedure provided by Presidency Towns Insolvency Act (1908).

Per *Napier, J.*—The Limitation Act has no application to the case. It provides periods with reference to suits, appeals and applications, the last being matters arising out of suits, and under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court and the High Court has no jurisdiction to entertain any suit by the Official Assignee against the insolvent in the exercise of its original civil jurisdiction. [P. 420, C. 1.]

(c) Insolvency—Whether doctrine of Agency applies to relations between Official Assignee and insolvent.

Quære:—Whether the doctrine of agency can be applied as between the Official Assignee and the insolvent though it may be resorted to in regard to the relations between the insolvent and third parties. [P. 419, C. 2.]

K. Ramanatha Shenai and *A. Narayana Sarma*—for Appellants.

M. O. Parthasarathy Iyengar and *M. D. Devadoss*—for Respondents.

Sadasiva Aiyar, J.—I entirely agree with the judgment just now pronounced by my learned brother, and for the reasons stated by him, that the house in question could not be claimed by the insolvent's widow, Ratna Bai, through any gift from her mother-in-law, that the house vested in the insolvent on his mother's death in 1897 and that the property in the next instant passed over to the Official Assignee. The widow's case that she held it adversely to her husband afterwards is not worth serious notice. I have also nothing to add to the reasons given by my learned brother in support

of his conclusion that for the vesting of the property in the Official Assignee, it is not necessary to have judgment entered up under S. 86 of the Indian Insolvency Act of 1848 and I join with him in respectfully dissenting from the decision in *In re Ackrill* (1).

Coming to the contention that the Official Assignee should have been referred to a suit even as regards this house (as he was referred to a suit in respect of the moveables), I am inclined to hold that even as regards the moveables, the questions raised, not only might have been, but ought to have been decided in the insolvency proceedings themselves. There is nothing in the Insolvency Act of 1848 (which has continued to apply to present proceedings by reason of S. 127, clause (1) of the new Insolvency Act) which empowers the High Court exercising jurisdiction in insolvency proceedings to refer the Official Assignee, who has taken such proceedings under S. 26, to a similar suit on original side. In *In the mtter of Umbica Nundun Biswas* (2) the learned judges say (page 442): "We believe that it has always been the practice of this Court to abstain from deciding difficult questions of title under that section," that is, S. 26 of the Insolvency Act of 1848, "and to leave parties to settle such questions by a regular suit and we entirely approve of that practice." Speaking for myself, I think that when jurisdiction is given by Statute to the Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be fild in another Court or in the same Court in its ordinary original civil jurisdiction the special procedure pointed out by the Legislature in respect of the decision of those particular questions ought to be brought to their natural and intended conclusion by the Court which is directed to try those questions, and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs. As, however, it is the same Court, namely, the High Court, which (after the Supreme Court was abolished) tries the suit to which the Assignee is referred, the judgment in the suit to which the Official Assignee is so referred, might be taken as a further judgment of the High Court in the insolvency proceedings in respect of the moveables and the matter becomes one of mere form and not of substance or jurisdiction.

As regards the last question (prescriptive title) if S. 28 of the Limitation Act applies, there can be no doubt that not only the Official Assignee's right to the property was extinguished, but the person whose adverse possession so extinguished the Official Assignee's right acquired a title to the property. S. 28, no doubt does not expressly state that the person in adverse possession himself gets the right which has been extinguished in his opponent. But as West, J., pointed out in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (3), and as Sir R. Couch, C. J., said in *Ram Lochun Chuckerbutty* v. *Ram Soonder Chuckerbutty* (4), "the title of a true owner is, to use the language of the Judicial Committee, extinguished in favour of the persons who have been in possession of the land for more than 12 years." Statutes of Limitation, though they are in form, they are construed so as to operate as laws of "acquisitive prescription." See also *Budesab* v. *Hanmanta* (5), in which it is said that adverse possession for more than 12 years "creates" a title by negation in the occupant which he can actively assert, if he loses possession, even against the true owner," quoting *Scott* v. *Nixon* (6), *Brassington* v. *Llewellyn* (7) and *Sanders* v. *Sanders* (8).

The next question is whether S. 28 of the Limitation Act is applicable so as to extinguish the Official Assignee's right and to vest it in the insolvent. That depends on the answer to the question, whether the Official Assignee had a right to institute a suit for possession against the insolvent in respect of the property that vested in the Official Assignee. S. 21 of the Act of 1848 directs the Official Assignee to reduce into possession all the property of the insolvent. The Assignee being an officer of Court in whom the property of a party to a

(1) (1895) 18 Mad. 24.
(2) (1877-78) 3 Cal. 434.
(3) (1885) 9 Bom. 198.
(4) (1873) 20 W. R. 104.
(5) (1897) 21 Bom. 509.
(6) 3 Dr. and War 388=61 R. R. 84.
(7) (1858) 27 L. J. 9 Ex. 297=1 F. & F. 27.
(8) (1882) 19 Ch. D. 373=51 L. J. Ch. 276.

litigation (namely, the insolvent) has become vested by operation of law, it follows that all questions between that party and Official Assignee in respect of that property have become the subject of the insolvency proceedings themselves. All assets which become vested in the Official Assignee for the purpose of the insolvency proceedings become part of the property involved in such proceedings. Now it is clear law in an ordinary suit if *A* sues on a good title for possession of his land after 11 years of dispossession, even if the defendant continued in possession for another 12 years during the pendency of litigation and before the suit became finally ripe for decision, judgment ought to be given for possession in plaintiff's favour, the continuance of the defendant's possession for 12 years during the pendency of the suit being wholly ignored. It seems to me that on the same principle rights to properties, which are or become involved in the insolvency proceedings and which rights have to be decided in those proceedings, cannot be affected by the possession in any of the parties to those proceedings during the continuance of those proceedings.

Under Ss. 20, 21 and 7 of the Insolvency Act, the Official Assignee becomes vested with the rights of the insolvent in all the real and personal estate of the insolvent for certain purposes, those purposes being shortly stated in S. 20, to be used in "trust for the benefit of the creditors of such insolvent." Thus the Official Assignee is clearly made an express trustee for the benefit of the insolvent's creditors. Under the new Act, S. 33, every insolvent has "to wait at such times and places on the Official Assignee as may be required by the Official Assignee" and he is also "to aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors." Though the duty of the insolvent to assist the Official Assignee and the creditors is not stated in such express terms in the old Act of 1848, I am inclined to hold that from the time of his adjudication as insolvent until his final discharge, the insolvent, by the force of the statutory provisions in that Act also, holds the position of an express trustee for his creditors just like the Official Assignee and as a trustee can never plead adverse, that is, hostile possession against his *cestui que trust*, the insolvent cannot also do so. It is on this principle that all the properties acquired by him become vested in the Official Assignee for the benefit of his creditors. Further, any possessory right which he gets by possession for say six months becomes vested in the Official Assignee, because that possessory right is also property belonging to the insolvent and if a man is prohibited by Statute from having such possession in himself as will entitle him to claim for himself the possessory right, it follows that possessory right which also becomes his every six months and which is lost in favour of the Official Assignee at the end of the six months, cannot go on accumulating for 12 years so as to give him a prescriptive title at the end of the 12 years. The accumulation cannot go on when the units which are to be accumulated become non-existent. A man who is prohibited by the Statute to claim hostilely and adversely to the Official Assignee and to his creditors represented by the Official Assignee cannot, it seems to me, be allowed to set up that he did so act adversely or hostilely. I, therefore, respectfully dissent also from the decision in *Kristocomul Mitter* v. *Suresh Chunder Deb* (9), in which it was held that an insolvent can hold after-acquired property adversely to the Official Assignee.

In the result I concur in dismissing the appeals with costs.

Napier, J.—These are appeals from two judgments of the Chief Justice (then Mr. Justice Wallis) in Insolvency Petition No. 2 of 1890, arising out of a motion made by the Official Assignee for a declaration that certain moveable and immoveable property was the property of the insolvent. The other parties were the widow and the four sons of the insolvent. The learned Judge declined to deal with the moveable property and referred the Official Assignee to a suit. But he inquired into the claim for the immoveable property and held that it vested in the Official Assignee. The first judgment dealt with the question of limitation and the second with the other points arising in the

(9) (1882) 8 Cal. 556.

matter. I shall deal with both in one judgment.

The points urged before us, some of which were also urged before the learned Judge, are, (1) that the Court had no jurisdiction to entertain the motion as the insolvent was dead, (2) that the matter was not one which could properly have been dealt with on motion, (3) that the property belonged to the widow of the deceased, either by gift from her mother-in-law or by adverse possession, and (4) that even if at one time it vested in the Official Assignee through the insolvent, the latter had acquired against the Official Assignee a new title by adverse possession.

The widow's claim by gift from her mother-in-law is given up, there being no registered document. Her claim by adverse possession is negatived by the learned Judge, on the ground that the husband treated the property as his own by mortgaging and that, therefore, the evidence did not establish possession in her at all. I entirely agree in this conclusion.

It remains to consider the claim through the insolvent. I am entirely unable to accept the contention that the Court had no jurisdiction. The suggestion was that the property had not vested in the Official Assignee completely before the death of the insolvent, the argument being that judgment should have been entered up under S. 86 of the Indian Insolvency Act of 1848, 11 and 12 Vic., C. 21, and reliance is placed on the case reported in *Ackrill, In re* (1) and the cases quoted therein. Undoubtedly there is an observation in that case which supports the contention. But I am unable to agree with the observations of the learned Judge therein, and think that they must have been intended to be limited to the facts of that case, which was one of money paid under a policy of insurance on the life of the insolvent to a person who had purchased his interest in the policy from the Official Assignee. It being found that the purchase was partly for the benefit of the insolvent the Court held that it vested in the Administrator-General, it being treated as property acquired after death. The observation, however, is as follows : " Seeing that future-acquired property does not vest in the Official Assignee from the date of the filing of the petition, it is only by proceedings subsequently taken during the life-time of the discharged insolvent that it may be made available for the scheduled creditors when a judgment is entered up under S. 86 of the Insolvency Act." With great respect to the learned Judge, if he intended this observation to apply to property acquired by the insolvent prior to his death, it is not supported by the language of the section or the recognised practice of the Court. S. 86 clearly has application only to the conditions that arise after the granting of a discharge in the nature of a certificate. After the discharge has been granted the Insolvency Court has no jurisdiction and, therefore, for the purpose of making future-acquired property available for the creditors, the Court was empowered on granting the final discharge to make it a condition that the insolvent shall consent to judgment being entered up against him in the High Court for so much of the creditors' claims as appear at that time to be due. To apply it to the stage prior to the issue of the certificate would be inconsistent with the clear language of the Act and create a double jurisdiction over the insolvent. Ss. 7 and 11 are perfectly clear. By the vesting order all the real and personal estate and all future estate, right, title and interest in real or personal estate etc., is vested in the Official Assignee for the time being, and by S. 21, every such Assignee is required with all convenient speed to take possession of all such estate of which immediate possession may be obtained and use his best endeavours to reduce into possession the rest of such estate. By the terms of the Act nothing further is required to complete the title of the Official Assignee. Mr. Shenai has relied on certain English cases in support of his contention. It is sufficient to say that those decisions are on Insolvency Acts with an entirely different procedure, a procedure under which future acquired property does not vest in the Official Assignee until an order has been made on motion after notice to the insolvent. These cases are of no assistance to us in construing the Indian Insolvency Act. There can be no question that all future-acquired property at once vests in the Official Assignee and this is the every day practice of the Court, vide

Rowlandson v. *Champion* (10), and *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (11).

The next point is that the learned Judge should have referred the Official Assignee to a suit. This is entirely a matter for the discretion of the Court, and it is hardly necessary to say that we shall be slow in appeal to differ from the view of a Judge on the original side on a matter of discretion. Further in my opinion the learned Judge exercised, if I may say so, a very wise discretion. The two claims were of an entirely different character. The widow and the sons claimed the moveable property against the insolvent as being their self-acquired property. On that view they were third parties, and although the Court has power under S. 26 and other sections to adjudicate on the claim, the learned Judge thought a regular suit would be the more fitting course. The claim for the house was not against the insolvent but through him and was a matter entirely between him and the Official Assignee. The disposal of the matter by the learned Judge as Commissioner was, therefore, *prima facie* the more proper course.

I now come to the last point which is a far more difficult question. The facts are as follows :—The house was purchased by the insolvent's mother from one of the creditors in 1894, four years after the petition. In 1897 the mother died and the property undoubtedly vested in the insolvent. From that date to the year 1913 when he died, he was in undisputed possession of the house. It is contended that, if the title of the Official Assignee accrued from the date when the insolvent acquired the property in 1897, which he undoubtedly did, the insolvent has acquired by 12 years' adverse possession a title against the Official Assignee by virtue of Article 144 and S. 28 of the Limitation Act, IX of 1908. The learned Judge has negatived this contention on two grounds : (1) that the possession of the insolvent was that of an agent for the Official Assignee and (2) that if the title did vest in him in the year 1909 by 12 years' adverse possession, it immediately re-vested in the Official Assignee. It is argued that both these views are incorrect. Speaking for myself I am not prepared to rest my decision on either of these views, though I must not be taken to have dissented from them. I have grave doubts whether the decisions that have held the insolvent to be an agent of the Official Assignee can be applied as between them. The learned Judge relies on *In re Bennet* ; *Ex parte Official Receiver* (12) in support of the proposition. Quoting *Herbert* v. *Sayer* (13) and *Cohen* v. *Mitchell* (14). Bigham, J., states that the first case establishes that a bankrupt who acquires property after his bankruptcy acquires it as agent for the trustee and is entitled to deal with it as such agent, unless and until the trustee as principal intervenes. Tindal, C. J., gives as the basis of that decision that otherwise there would be no protection to persons dealing with an uncertified bankrupt and in *Cohen* v. *Mitchell* (14), Lord Esher states the proposition as follows :—" Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." It is clear, therefore, that the cases at all events confine the proposition to the relations between the insolvent and third parties and expressly base it on the protection of the rights of third parties.

The learned Judge also relies on the fact that this contention would have afforded a ready answer in *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (11) but that decision did not turn on that point. That is so, but it is clear from the report that the point was not raised. In *Suja Hossein* v. *Monohur Das* (15), O'Kinealy and Hill, JJ., took the opposite view, though in that case the basis of the decision in favour of the insolvent appears to have been that the Official Assignee had knowledge of his possession and that, therefore, the possession was adverse. For these reasons I am doubtful whether the doctrine of agency is an answer to the claim by adverse possession. I am further doubtful whether assuming a title by adverse

(10) (1894) 17 Mad. 21.
(11) (1895) 28 Mad 168.
(12) (1907) 1 K. B. 149=76 L. J. K. B 134.
(13) (1844) 5 Q. B. 965=2 D. & L. 49.
(14) (1890) 25 Q. B. D. 262=59 L.J.Q.B. 409.
(15) (1897) 24 Cal. 244.

possession to have been acquired, that title would vest in the Official Assignee. S. 28 of the Limitation Act does not say in express terms that the title is acquired. It says that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is true that decisions have construed this as meaning that the title becomes vested in the adverse owner. But it seems to me to be rather straining the language of the section to say that, although the Official Assignee's title has been extinguished, he at once acquires a new title. I prefer to rest my decision on the view that the Limitation Act has no application. The Limitation Act provides for periods with reference to suits, appeals and applications, the last being applications in matters arising out of suits. It is contended that the Official Assignee could have brought a suit against the insolvent. In my opinion the High Court would have no jurisdiction to entertain any such suit. Under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court. Orders are made against him on the application of the Official Assignee. He can be directed to hand over property and he can even be tried and sentenced by the Commissioner. Where the intervention of the procedure of the High Court is provided for, it is only, as pointed above, for the purpose of affecting him after he has passed out of the jurisdiction of the Insolvency Court, and even then it has to be noted that by S. 86 no proceeding by suit in the High Court is contemplated, but only that he shall *consent to judgment* being entered up against him in the High Court. It seems to me impossible that there could be a concurrent jurisdiction with respect to the insolvent. Obviously if the Official Assignee could bring a suit against the insolvent in the High Court, the latter could institute a suit against the former. I have asked for a reference to any case where either of these have been done and the learned Advocate has been unable to refer me to any. It seems to be impossible that the Legislature could have contemplated that a man should in respect of his property be subject to two concurrent jurisdictions and that while the Commissioner in Insolvency was making an order against the insolvent with respect to any property, the High Court might be deciding that he was entitled to the property. Such a position would, of course, lead to conflict and an insolvent might, if that were possible, find himself being tried for contempt by the Insolvency Court for claiming the benefit of a decree of the High Court. I have no doubt that there has never been either in the Supreme Court or in the High Court any original civil jurisdiction as between the Official Assignee and an insolvent. The Official Assignee is an officer of the Court in a position analogous to that of a Receiver. A Receiver would not be required to proceed by suit in ejectment against a party who persists in remaining in possession of a portion of the property, but would apply to the Court for orders for his eviction *vide* Kerr on Receivers (6th edition), page 226, and *In re Sacker, Ex parte Sacker* (16), the judgment of Fry, L. J., on page 185. In like manner under the Insolvency Act the Official Assignee could apply for orders in respect of a recalcitrant insolvent, and I have no doubt that the Court could deal with him, if necessary, in contempt. It is true that there is no provision in the Insolvency Act of 1848 corresponding to the specific words in the Presidency Towns Insolvency Act, III of 1909, S. 33 (4), under which such an insolvent is held to be guilty of contempt of Court and can be punished accordingly, and that though the old Act specifically provides for orders to deliver up property being issued against third parties, it nowhere speaks of such orders as against the insolvent. But the absence of the specific provision with regard to a person, who is under the personal control of the Court, no more prevents the application of the process for contempt against him than does the corresponding absence of any such provision in the case of Receivers or with respect to other disobedience of a party to suit to the orders of the Court, where the Court has been held to have an inherent power to commit. I am not certain that this procedure by contempt is not of itself an answer to the theory of adverse possession, for it would be strange that an insolvent could acquire a title to property by refraining from doing his duty to assist the Official Assignee in

(16) (1889) 22 Q. B. D. 179=58 L. J. Q. B. 4.

realising his assets for the creditors. I am aware that in *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (11) it was held that there is no provision in the Insolvency Act of 1848 imposing upon an insolvent the duty of disclosing to the Official Assignee that he has become possessed of property since the making of an order of personal discharge, and that consequently non-disclosure by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors or on the Official Assignee, so as to render S. 18 of the Limitation Act applicable. But speaking with the very greatest deference to the learned Judges, I am not satisfied that that view is correct. It is the duty of the insolvent to assist the Official Assignee. They are not at arm's length and it is difficult to draw a line between non-disclosure and concealment. I am more inclined to take the view that S. 33 (4) does not alter the law, and if so, whether it be fraud within S. 18 of the Limitation Act or whether the principle is that an insolvent will not be allowed to defy the jurisdiction of the Insolvency Court over his property, I am inclined to think that he could not rely on adverse possession against the Official Assignee. It is not, however, necessary to decide this point and I rest my decision on the language of the Insolvency Act. Dismissed with costs. (One Counsel).

S.N./R.K.

Appeals dismissed.

A. I. R. 1916 Madras 421

SESHAGIRI AIYAR AND NAPIER, JJ.

T. K. Parasupattar and *another*—Defendants—Appellants.

v.

T. K. Venkatachala Pattar—Plaintiff—Respondent.

Appeal No. 307 of 1914, decided on 2nd March, 1915, against the order of Sub-Judge, South Malabar, in Misc. Pet. No. 1672 of 1914.

Practice—Subordinate Court—Decision of Appellate Court if not appealed against, about binding nature of documents is binding on lower Court.

It is the duty of a Subordinate Court to accept a pronouncement made by an Appellate Court which the parties have chosen not to appeal against and have acted upon.

[P. 421, C. 2.]

A Judge acts illegally in acting upon documents which have been pronounced by the Court to which he is subordinate as not binding on the parties.

[P. 422, C. 1.]

T. R. Ramachandra Aiyar and *N. Narayana Sarma*—for Appellants.

A. Sundaram—for Respondent.

Judgment.—A suit was filed for partition of the family properties. In the course of the suit, the matters in dispute were referred to an arbitrator. While the proceedings were pending before him, the parties filed two statements which are marked as Exhibits A and B, by which they agreed to a particular mode of division regarding some of the properties in suit. The partition of the other properties was to be made by the arbitrator and an award dealing with all the properties was to be passed. The arbitrator presented his award to the Court. It was objected to on the ground that the arbitrator acted partially and was induced by corrupt and improper motives in his decision. The defendants asked that the award be set aside. In their petition they stated that they had no objection to the division of the properties as proposed by the parties in Exhibits A and B. But the Subordinate Judge set aside the whole award, on the ground of the misconduct of the arbitrator and directed the suit to be posted for disposal before him. Against this order, a revision petition was filed. One of the grounds taken was that the lower Court should have upheld the award in so far as it dealt with the properties covered by Exhibits A and B. Mr. Justice Oldfield held that the order superseding the arbitration was not perverse and with reference to the contention that the Subordinate Judge should not have set aside the award in its entirety, the learned Judge pointed out that Exhibits A and B were only given conditionally. We understand the learned Judge to mean that the agreements were intended to assist the arbitrator and were not binding and final contracts as between the parties. There was no appeal against the judgment of Mr. Justice Oldfield. When the case came on for trial, the Subordinate Judge criticised the judgment of the learned Judge of this Court and refused to act upon his conclusion. We are surprised at the attitude of the Subordinate Judge. It was his duty to have accepted a pronouncement which the parties have chosen not to appeal against and to

have acted upon it. The Subordinate Judge's order passing a decree in terms of Exhibits A and B must be set aside, as these documents have been held not to bind the parties in the suit. Mr. Sundaram argues that the statements in the judgment of Mr. Justice Oldfield regarding Exhibits A and B are only *obiter* and are not binding on the lower Court or on the parties. We cannot accede to the contention. That statement was necessary for the conclusion come to by the learned Judge ; if wrong the order should have been appealed against. We must reverse the order of the Subordinate Judge, as he acted illegally in acting upon documents which have been pronounced by a Court to which he is subordinate as not binding on the parties. Each party to bear his or their own costs.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 422

WHITE, C. J. AND OLDFIELD, J.

V. Lakshmamma—Defendant—Appellant.

v.

V. Ratnamma – Plaintiff—Respondent.

Original Side Appeal No. 108 of 1912, decided on 12th August, 1913, from the decree of Wallis, J., dated 2nd December, 1912.

(a) Succession Act (1 of 1865), S. 187—S. 187 even bars stranger to plead legatee's title as jus tertii in his defence.

S. 187 of the Succession Act (XI of 1865) affects not only the establishment of a right by the legatee himself or some persons claiming under him but debars also a person who desires to establish the legatee's right, merely as a *jus tertii* for the purpose of his defence [P. 423, C. 1 & 2.]

(b) Succession Act (1 of 1865), S. 91—Legatee's right is inchoate unless asserted by executor—Legacy even if vested can be divested .

The estate vested under S. 91 of the Succession Act is not full or absolute, and until the assent of the executor is given, the legatee has only an inchoate right to the legacy. [P. 423, C. 2.]

A legacy, even if vested, would be divested by the disclaimer of the legatee. [P. 424, C. 1.]

(c) Practice—Pleadings—Admission of existence of will but denial of validity on some grounds—Grounds found to be not correct—He can raise other objections.

Where a person admits the existence of a will, but denies its validity, the fact that the denial is based on a ground which has been held to be mistaken cannot alter the scope of the admission or disable him from taking other available objections [P. 423, C. 2.]

M. O. Parthasarathi Aiyangar and *R. Kuppusami Aiyar*—for Appellant.

N. Chandra Sekhara Aiyar and *Ramaswami Aiyar*—for Respondent.

Judgment.—The relationship between the persons concerned is given in the genealogical tree attached to the plaint and is not disputed. There is no reason for doubting the correctness of the learned Judge's conclusions that the suit house was the separate acquisition of the deceased Ramamma and the 1st defendant and that the suit land was the separate acquisition of the former. It is argued, with reference to *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1), that those two members of the family, one of dancing girls, comprised all the members of a sub-branch and could hold property jointly, as a distinct corporate unit within the larger corporate unit. There is no foundation for that argument, since there is no reason for regarding these two members as a sub-branch to the exclusion of the 1st plaintiff, their sister. The learned Judge was, therefore, right in holding that the house was the common property of Ramamma and the 1st defendant and that the former's half share in it and the suit land passed to her mother, Seethamma, by inheritance on her death.

The learned Judge's decision as to the suit jewels follows that regarding the house. The first plaintiff claimed both on the same basis. The 1st defendant who was alone concerned with the former, no doubt, claimed some of them as her separate acquisition in her written statement. But there was no distinct issue regarding them. The learned Judge refers in his judgment to her case as being that they were acquired jointly. It is alleged and it is to be presumed in these circumstances that this was the case actually put forward at the trial. That it was so, is consistent with the 1st defendant's failure to give evidence and with the evidence of the defendant's 1st witness who alone was examined by her on the point. The claims to the jewels and the house were, therefore, dealt with rightly on the same footing.

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(1) (1902) 25 Mad 149.

These conclusions of the learned Judge did not correspond either with the plaintiff's case, that the house, land and jewels were the joint property of the whole family or with the 1st defendant's that the two first were the joint property of Ramamma and herself and that some of the jewels were her own separate acquisitions. The argument to be dealt with next arises from these conclusions and, therefore, has been attempted first in this Court. In plaint paragraphs 7 and 8 there is a reference to a will executed by Seethamma, mother of the 1st plaintiff and the 1st defendant, whereby she bequeathed all property to which she was entitled, to the 2nd and 3rd plaintiffs and nominated them executrixes. The plaintiffs submitted that Seethamma had no power to deal with the property by will since (in accordance with their case) it belonged to the joint family ; and the 2nd and 3rd plaintiffs, therefore, did not claim under the will. The 1st defendant has, however argued here that this reference to a will must have the effect that the property must be taken to have vested in accordance with its terms in the 2nd and 3rd plaintiffs and that in the absence of a conveyance by them to the 1st plaintiff, the latter has no title, on which she can sue in ejectment, as she in effect is doing.

It has been pointed out that the defendants' contention could not have been raised in their pleadings since it arises from the findings by the learned Judge which are not in accordance with either party's case. The plaintiffs, no doubt, must not be prejudiced by the stage, at which that contention has been advanced ; and it might have been necessary to grant a remand for a further trial after amendment of the plaint with reference to the will and filing of an additional written statement but that the 1st defendant's arguments must be held untenable for two reasons.

Firstly, it is admitted that up to the date of the learned Judge's decision, the will had not been proved. It was made in Madras and, under S. 2, Hindu Wills Act, is subject to S. 187, Succession Act. No right, therefore, as legatee can be established under it.

It has been urged that S. 187 affects only the establishment of a right by the legatee himself or some persons claiming under him and does not debar the 1st defendant who desires to establish the legatee's right, merely as a *jus tertii* for the purpose of her defence. No authority has been cited and no reason suggested for such a distinction. It is said further that S. 187 is further irrelevant, when the plaintiffs have admitted the existence of the will and its terms. The answer is that, though they admitted the existence of the document, they denied its validity or the validity of rights under it, and the fact that their denial was based on one ground which has been held to be mistaken cannot alter the scope of their admission or disable them from taking other available objections.

Then as to the merits of the 1st defendant's arguments. They depend on the assumption that Seethamma's will is effective. The 1st defendant's case is that the property bequeathed to the 2nd and 3rd plaintiffs vested in them ; and, in our opinion, that is not sustainable. S. 91, Succession Act, no doubt, provides for the vesting of the estate in the legatee from the date of the testator's death. But the estate thus vested is not full or absolute, the reference is only to an interest in the legacy, not the legacy itself ; and the distinction between a vesting in interest and in possession is implied in S. 106 and the illustration to S. 292, in which the effect of the executor's assent is dealt with. [*Vide* also *Bachman* v. *Bachman* (2) and *Doe d. Saye and Sele* (*Lord*) v. *Guy* (3)]. Until that assent has been given, the legatee has in any case only an inchoate right to the legacy. Williams on Executors, 10th Edition, page 1101. So far no account has been taken of the effect of the legatee's disclaimer. There is very little English and no Indian authority regarding it. But in *In re Hotchkys ; Freke* v. *Calmady* (4), there are references to the acceptance of the legacy as essential, which are inconsistent with its vesting in the legatee against his will. And at page 84, Williams Law of Real Property, 20th Edition, *Nicolson* v. *Wordsworth* (5) is referred to, and it is said:—"An heir-at-law is the only person in whom the Law of England vested

(2) (1884) 6 All. 583.
(3) (1802) 3 East 120.
(4) (1886) 32 Ch. D. 408.
(5) (1818) 2 Swanston 365.

property whether he would or not. If I make a conveyance of land to a person in my life-time or leave him any property by my will, he may, if he pleases, disclaim taking it, and in such case, it will not vest in him against his will." Though this principle is not formally stated in the Indian Law, it is reasonable and there is nothing repugnant to it therein or in Indian decisions. It may, therefore, legitimately be adopted. The result is that the 2nd and 3rd plaintiffs' legacy did not vest in them completely or indefeasibly and that, as far as it vested at all, it would be divested by their disclaimer. Being undisposed of, Seethammal's interest must go, as the plaintiffs contend that it should, to the 1st plaintiff and to the 1st defendant in equal shares. *Morarji Cullianji* v. *Nembai* (6).

The 1st defendant objects to the application of the Partition Acts for which the decree provides. The 1st plaintiff consents to its amendment by the removal of this provision. The appeal is, therefore, allowed to this extent. It is dismissed in other respects. The 1st defendant will pay the 1st plaintiff's costs.

S.N./R.K.

Appeal partly allowed.

(6) (1893) 17 Bom. 351.

A. I. R. 1916 Madras 424

WALLIS, C. J. AND HANNAY, J.

Nachiappa Chetty—Plaintiff—Appellant.

v.

Dakshinamurthy Servai and *others*—Defendants—Respondents.

Civil Appeal No. 24 of 1913, decided on 8th February, 1915, from the decree of Tempy., Sub-Judge, Sivaganga, in Original Suit No. 74 of 1912.

Hindu law—Debt—Father—Burden of proof—It is sufficient to join sons in suit on promissory note without specifically pleading binding nature—Onus of proof of want of consideration is not changed by joining sons.

In a suit on a promissory note executed by a father and filed against him, it is sufficient to join the sons and give them an opportunity of showing circumstances which would prevent the debt being binding on them or a decree being passed against them, and it is not necessary to plead and prove that the debt was incurred by the father for purposes binding on the family. [P. 425, C. 2.]

Where the plea of want of consideration is raised, the *onus* of proof in the case of the sons is not different from that in the case of the father. A. I. R. 1915 Mad. 618, expld.; 23 Mad. 597, Foll; 30 Mad. 88 (F. B.), Ref. to. [P. 425, C. 2.]

T. R. Ramachandra Aiyar and *A. Krishnaswami Aiyar*—for Appellant.

K. Srinivasa Iyengar and *C. Padmanabha Iyengar*—for Respondents.

Judgment.—This is a suit brought upon two promissory notes against one Ramaswami Chetti, the 1st defendant, who has since died and his minor son, the 2nd defendant. So far as the 1st defendant is concerned, the *onus* was of course upon him to show that the promissory notes were not supported by consideration, and the Subordinate Judge has found that he had failed to discharge that *onus*. The 1st defendant was residing at Kundanoor in the Ramnad District and was a partner in a firm which carried on business in Tinnevelly and also in Rangoon. He is stated to have executed the plaint notes for Rs. 7,000 and 6,000 respectively in May and July 1908. The plaintiff's case is that the notes were executed by him at Elayirampunnai, the plaintiff's father's village, whereas according to the defence one of them was executed at Kannakude near Madura during a festival and the other in a dancing girl's house at Madura. The defence case is that the second note was a mere renewal of the first and was antedated to May 1908. The defendants have put forward a very extraordinary story which we are altogether unable to accept.

* * * *

While we have no hesitation in rejecting the case put forward for the defence, we have carefully considered whether on the evidence for the defence it might not be said that there was sufficient to shift the *onus* and throw upon the plaintiffs, the *onus* of proving that full consideration had been given for the notes. No doubt the plaintiffs have exercised what might perhaps be described as a considerable economy of truth. They merely prove the execution of the notes and the payment of the money at the plaintiff's village and they give no explanation as to how the transaction came to be entered into nor do they produce any accounts. But on the whole we have come to the conclusion

that there is not sufficient to justify us in holding that the *onus* is shifted or in differing from the conclusion at which the Subordinate Judge has arrived. So much for the facts.

It has, however, been argued that as against the minor, the 2nd defendant, the *onus* was upon the plaintiffs and the recent decision of the Full Bench in *Govindan Nair* v. *Nanu Menon* (1) has been referred to, and it has been argued on the authority of that decision that as the suit is on the note it cannot, according to numerous cases, be treated as on the original cause of action against the maker of the note and that consequently the other defendants, who are sons of the 1st defendant cannot be made liable in this suit. That was an application to revise a decree of a Small Cause Court against the members of a *tarwad* on a promissory note executed by the deceased *karnavan* of the *tarwad* and was the subject of a reference to a Full Bench. It did not appear that it had either been alleged in the plaint or proved in evidence that the debt was contracted for purposes binding on the *tarwad*, facts necessary to be proved according to the decision of the Full Bench in *Krishna Iyer* v. *Krishnaswami Iyer* (2). It was held in that case that in order to enforce a promissory note not only against the maker who was the managing member of the family when he executed it, but also against the other members of the joint family, it was necessary to allege in the plaint and prove that the debt was contracted in circumstances binding on the family and that in a suit so framed the junior members of the family might properly be held liable. In the judgment of the Full Bench in *Subba Narayana Vathiyar* v. *Ramaswami Iyer* (3) the authority of this case was purposely left unaffected and all that was decided in *Govindan Nair* v. *Nanu Menon* (1) was that the circumstances of that case did not bring it within the authority of *Krishna Iyer* v. *Krishnaswami Iyer* (2), which they did not as I have already pointed out. This seemed to us sufficient to dispose of the case, and the judgment which is very brief merely says that the suit was based on the promissory note and not on the original cause of action and that consequently *Krishna Iyer* v. *Krishnaswami Iyer* (2) did not apply. I do not think this meant anything more than that the facts which gave rise to the liability of the junior members were not alleged in the plaint and proved. If they had been alleged and proved, it might be said that in one sense it was a suit upon the original cause of action, but this way of putting it does not take account of the decisions that where the debt and the promissory note came into existence at one and the same time, the maker must be sued on the promissory note and not on the original cause of action. The decision in *Krishna Iyer* v. *Krishnaswami Iyer* (2) is authority for the position that even if the suit against the maker is on the promissory note, it is permissible in the same suit to plead and prove facts which render the other members of the joint family liable, and it was not intended to interfere in any way with the authority of the decision in *Govindan Nair* v. *Nanu Menon* (1) to which I was a party. In the present case in order to make the 3rd defendant as guardian of 1st defendant liable, it is not necessary to plead and prove that the debt was incurred by the father for purposes binding on the family, and it is enough to give him an opportunity of showing, if he can, that it was incurred for purposes which were illegal or immoral which it is for him to prove. Applying the principle of the decision in *Krishna Iyer* v. *Krishnaswamy Iyer* (2) to the case of a suit against a father, the executant of the promissory note, and his sons, it is sufficient to join the sons and give them an opportunity of showing circumstances which would prevent the debt being binding on them or decree being passed against them. This form of suit is of every day occurrence and there is in my opinion nothing in the decision in *Govindan Nair* v. *Nanu Menon* (1) to affect its validity. In these circumstances there can be no question of there being any different *onus* in the case of sons from that in the case of the father. Therefore, that objection also fails.

In the result, the appeal fails and is dismissed with costs.

S. N./R. K.

Appeal dismissed.

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(1) A. I. R. 1915 Mad. 618=26 I. C. 750.
(2) (1900) 23 Mad. 597.
(3) (1907) 30 Mad. 88 (F.B.).

A. I. R. 1916 Madras 426

SADASIVA AIYAR AND NAPIER, JJ.

Govind Doss Krishna Doss Varu --Defendant—Appellant.

v.

Gurram Chinnappa Naidu and *others*—Plaintiffs—Respondents.

Civil Appeals Nos. 409, 1064, 1937 to 1951, 1953 to 1999 and 2001 to 2003 of 1912, decided on 9th December, 1914, from the decree of Dist., Judge, North Arcot in Appl. Suits Nos. 100, 177, 104, 108, 109, 111 to 122, 124 to 133, 135 to 138, 140 to 142, 144 to 167, 169, 171, 176, 178 to 180 and 182 to 184 of 1911.

Madras Estate's Land Act (1 of 1908), S. 13 (3) —S. 13 is not retrospective—40 years payment raises presumption of agreement to pay enhanced rent—Remission of rent for land set apart for well, is landlord's contribution for enhanced rent.

S. 13, clause (3), of the Madras Estates Land Act I of 1908, has no retrospective operation. [P. 426, C. 2.]

A valid contract to pay rent at enhanced rate can be presumed from payments at that rate for 40 years. [P. 426, C. 2.]

Where a landlord set apart a considerable area of land for digging of wells for irrigating the lands in respect of which enhanced rates are claimed and charged no rent for the area so set apart, he must be deemed to have contributed to the cost of the wells dug by tenants on that area, though at their expense, and such contribution is sufficient consideration for a contract to pay rent at enhanced rate. 28 Mad 444; and 27 I. C. 688, Foll. 35 Mad. 134. Dist. [P. 427, C. 1.]

V. C. Seshachariar and *R. Sadagopachariar*, *K. Bashyam Aiyangar* and *C. Narasimhachariar*—for Appellant.

P. Nagabhushanam—for Respondents.

Facts.—These suits were filed by the *ryots* of Kammapalli in the Narayanavanam *taluk* against the defendant, the mortgagee with possession of the said *taluk*, under S. 55 of the Madras Estates Land Act, I of 1908, to compel him to grant a proper *patta*. The tenants alleged *inter alia* that the defendant had no right to recover enhanced rates for wet crops raised on *manavari* land with the aid of wells dug at their expense. The defendant mainly contended that the sites of the wells, which were *poramboke*, were given by him free of rent for the digging of the wells, that as such he had contributed to the cost of such wells, that enhanced rates were, therefore, legally claimable by him, and that the tenants had been paying the said enhanced rent for the last 40 years and so could not go behind the said payments. The Court of first instance held that the landlord was not entitled to levy enhanced rates as the wells had been dug at the sole expense of the tenants. On appeal the District Judge concurred with the Head Assistant Collector. The defendant thereupon appealed to the High Court.

JUDGMENT.

Napier, J.—S. A. No. 409 of 1912. The question that arises in this appeal is whether in the circumstances of this case the *zemindar* is entitled to charge enhanced rates for crops grown with the aid of well water. The District Judge has considered the matter solely with reference to S. 13, clause 3, of the Madras Act I of 1908 and has assumed that that section applies to improvements made prior to the Act. It had been decided in *Raja Kumara Venkata Perumal* v. *Ramudu* (1) that that clause has no retrospective operation. The further point decided in that case was that a valid contract to pay at enhanced rate could be presumed where the rate had been paid for a period of 40 years or so. The reasoning of the District Judge cannot, therefore, be accepted and it has only to be considered whether there was a valid contract in this case, that is to say, whether, although the *ryots* did in fact dig the wells utilised for irrigating the crops, the landlord did or did not contribute something towards the construction of the wells which would in law amount to a consideration for a contract to pay enhanced rates. It is admitted that the sites occupied by the wells have never been charged with rent and that they are entered in the estate accounts as *poramboke*. The District Judge takes the view that as there is a term in the *patta* under which the *zemindar* is entitled to charge rent for that land, he cannot set up that the abstention to enhance rent was the consideration. We cannot accept this view. Undoubtedly a considerable area though made up of small plots has been rendered uncultivable by the construction of a number of wells within it and admittedly if that area had not been set apart for wells, the *zemindar* would have been entitled to receive rent from any cultivating tenant

(1) (1915) 27 I. C. 688.

in respect of it. By handing over that area to the *ryots* for the construction of wells he has in our opinion contributed to the cost of the wells and such contribution is good consideration for the contract set up by him. It is admitted by the *ryots* that they have been paying these increased rates for about 40 years ; and on the principle enunciated in the case above quoted and based on the judgment of Subramania Aiyar, J., in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2), it would be open to us to presume consideration for the contract. This case is, however, a stronger one, for there is definite evidence of that consideration. We, therefore, hold that the proposed *patta* is not invalid on that ground. In this view it is not necessary to decide the other point raised, namely, that there is in fact no enhancement, though we may observe that the decision in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3), relied on, does not seem to us to be applicable to the present case. We, therefore, reverse the decision of the District Judge and hold that the *patta* tendered is a proper *patta*. The plaintiffs will pay the costs throughout.

The decision in this case governs Second Appeal No. 1064 of 1912 and the other cases posted with it.

Sadasiva Aiyar, J.—I concur.

S.N./R.K.

Appeals allowed.

(2) (1905) 28 Mad. 444.
(3) (1912) 35 Mad. 134=8 I. C. 330.

A. I. R. 1916 Madras 427

SPENCER AND TYABJI, JJ.

Periammal and *others*—Defendants—Appellants.

v.

Vaithilinga Udayar and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 730 of 1912, decided on 18th December 1914, from the decree of Dist., Judge, Trichinopoly, in Appl. Suit No. 72 of 1911.

Civil P. C. (5 of 1908), O. 41, R. 31—What are requirements of R. 31 stated.

An Appellate Court's judgment which does not set out the points for determination, the Court's decision thereon and its reasons for so deciding, does not fulfil the requirements of O. 41, R. 31, and cannot be upheld. [P. 427, C. 2.]

T. Rangachariar—for Appellants.

M. D. Devadoss—for Respondents.

Judgment.—We cannot regard the lower Appellate Court's judgment as satisfactorily disposing of the questions upon which the parties were at issue. The District Judge does not set out the points for determination, his decision thereon, and his reasons for so deciding, as O. 41, R. 31, Civil Procedure Code requires. After some passing comments on some portions of the evidence and upon the significance attached by the District Munsif thereto, the Judge concludes by saying : "The lower Court's decree will be reversed and the plaintiff's suit will be decreed with costs throughout. Ordinary mortgage decree. Subsequent interest 6 per cent." He should have recorded distinct finding on the material issues in the case, especially on the 7th issue, which was whether the discharge pleaded by the defendants was true.

We must, therefore, ask the present District Judge to record fresh findings on all the issues on the evidence on record and in doing so he should deal with the grounds upon which the District Munsif in paragraphs 14, 16, 17, 18 and 19 of his judgment held the suit bond to have been discharged, among which the following have been mentioned to us:—

(1) That no demand had been made for payment since the amount became due in 1879, although other claims between the same parties were proceeded with ;

(2) that this debt was excluded at partition (*vide* Exhibit VI) ;

(3) that a certain other encumbrance was mentioned in the sale-deed, Exhibit II, and it was stated that there were no other encumbrances ;

(4) that plaintiff attempted unsuccessfully to negotiate his interest in this bond ;

(5) that the 1st defendant had a motive to surrender possession of this document as he was quarrelling with his son ;

(6) that there is evidence that Exhibit A was at some time after its execution in the possession of the mortgagor, from which a presumption might arise that it had been discharged (*vide* Indian Evidence Act, S. 114, Illustration I).

Findings must be returned within six weeks from the re-opening of the District Court. Ten days will be allowed for filing objections.

In compliance with the above order of this Court the District Judge, Trichinopoly, submitted the following.

Findings.—Plaintiff sued on a hypothecation bond for Rs. 400, dated 15th July, 1877, by 1st defendant to plaintiff's junior paternal grandfather. The Munsif found that the bond was discharged and that plaintiff sued only at the instance of his friend, first defendant. First defendant was *ex parte* The other defendants alienees from him and the people really affected, contested the suit. My predecessor found discharge was not proved and he decreed the suit.

2. On second appeal I am asked for fresh findings on all the issues in the light of remarks made by the High Court.

3. *Issues* 1, 2, 3 *and* 6: The Munsif found these in plaintiff's favour. It is conceded now that these findings are right. I find accordingly.

4. *Issues* 4 *and* 7 are the matters in dispute, whether certain payments relied on by plaintiff are true and valid—and is the discharge pleaded by defendants true? This simple mortgage-bond of 1877 had two years for re-payment and died a natural death in 1891. It lay dead for 19 years and was then dug out of its grave and sued on in virtue of S. 31. There is a strong common sense presumption against documents brought to life in this fashion. There is a large human probability that they were in fact paid off somehow, because people do not usually allow such things to become barred. Now plaintiff claims that this document was not really barred at all, because defendants made three payments in 1887, 1895 and 1900. These payments are not endorsed on the bond. They are spoken to only by plaintiff and 1st defendant who are, I think, colluding.

5. In Exhibit VI in 1901, a partition-deed between 1st defendant and his sons, all the debts, however small, are mentioned. Plaint debt is not mentioned. First defendant explains the omission as he says he thought it was barred. It would not have been barred if payments had been made in 1887, 1895 and 1900. Hence I do not believe these payments and find issue 4 against plaintiff. First defendant sold property to his son. The son compelled registration and sued for the property in Original Suit No. 1620 of 1909—some of the items being hypotheca in the present case. It was after this that plaintiff sued on this mortgage-bond and defendants contend that 1st defendant gave him the old discharged bond for the purpose out of enmity.

6. I agree with the Munsif that suit bond must have been discharged. I find this partly on general presumption—that nothing was done with it during its natural life-time and the three payments alleged by plaintiff are false in view of 1st defendant's statements—and partly on Exhibit I and evidence connected therewith.

7. Exhibit I is a mortgage-bond of 11th November 1887 by 1st defendant to plaintiff's brother-in-law for Rs. 250. According to D. W. No. 3, a *karnam* who attested this bond, it was executed to pay off plaint mortgage which bond was then returned to 1st defendant.

8. First defendant denies this and says he got no money on Exhibit I which was cancelled. But the document recites both payment and re-payment of money and in view of 1st defendant's contention about payments on suit bond and his omission of suit debt in his partition-deed, I attach no value to 1st defendant's statements. First defendant's son, D. W. No. 2, swears to the same effect as D. W. No. 3.

9. I am of opinion that suit bond was discharged finally by money received under Exhibit 1. Nothing is due on it, and on issue 5 no interest is due. This suit is the result of collusion between plaintiff and 1st defendant in consequence of 1st defendant's son suing him. Hence on the 8th issue plaintiff is entitled to no relief.

This second appeal coming on for final hearing after the return on the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following.

Judgment.—Accepting the findings we allow the appeal and restore the decree of the District Munsif. Appellants will get

their costs in this Court and the District Court from the assets of the plaintiff in 9th respondent's hands. Respondents will bear their own costs.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 429

SPENCER AND COUTTS-TROTTER, JJ.

Lakshumanan Chetty—Plaintiff—Appellant.

v.

Muthiah Chetty and *others*—Defendants—Respondents.

Second Appeal No. 115 of 1913, decided on 28th July, 1915, from the decree of Dist. Judge, Ramnad, in Appeal Suit No. 276 of 1912.

(a) Civil P. C. (5 of 1908), S. 47—Dismissal of suit for specific performance on ground that execution application lies is bad as S. 47 allows suit to be treated as proceedings—Want of jurisdiction to execute is no ground.

In the face of S. 47 of the Civil Procedure Code, which permits suits to be treated as proceedings, the dismissal of a suit on the ground that the plaintiff must have applied for executing a decree and not have sued to enforce specific performance of a contract is bad in law. The mere fact that the Court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application in execution. [P. 429, C. 2.]

(b) Specific Relief Act (1 of 1877), S. 23—Stranger to contract cannot seek specific performance.

A stranger to a contract is not entitled to enforce specific performance of the same A.I.R. 1914 Mad 701 and 34 All. 63, Foll. [P. 429, C. 2.]

(c) Civil P. C. (5 of 1908), S. 34—Appellant getting advantage which was lost in lower Courts by negligence and failure to adduce evidence—Costs not to be allowed but must be saddled with respondent's costs also.

An appellant, who, in second appeal, gains an advantage which he had lost by his negligence in the Courts below in not setting out his case properly and by not supporting it, in the first Court, by proper evidence, is not only not entitled to his costs of appeal but must pay the costs of the respondent. [P. 430, C. 1.]

C. S. Venkatachariar—for Appellant.

C. V. Ananthakrishna Iyer—for Respondents.

Facts of the case sufficiently appear from the judgment.

Judgment.—The District Judge in appeal has dismissed the plaintiff's suit on the ground that the plaintiff, instead of suing for specific performance of the contract, should have made his application in execution.

We think that the District Judge should not have dismissed the suit when S. 47, Civil Procedure Code, permits suits to be treated as proceedings under this section.

The only reason given by the District Judge for this course is that the Court which decided the suit would have had no jurisdiction to determine the matter in execution. This is not in our view a sound reason. This suit itself, though tried by the Temporary Subordinate Court of Ramnad, was instituted in the Permanent Subordinate Court of Ramnad, before which proceedings in execution of Original Suit No. 166 of 1907 of the Chief Court of Rangoon were actually pending at the time of this suit, the decree having been transferred to that Court for execution. The Temporary Subordinate Court is a relieving Court, trying such suits as are transferred to it from the Permanent Subordinate Court. It was quite within the power of the District Judge to do justice to the parties by directing the suit to be treated as a proceeding in execution and at the same time transferring it to the file of the Permanent Subordinate Court for disposal.

The respondents' Pleader now seeks to support the lower Appellate Court's order by arguing that the District Judge was wrong in thinking that the plaintiff could sue upon the contract entered into by the respondents with Annamalai Chettiar. On the face of it this contention is a good one, as the contract, Exhibit A, purports to be one only between Annamalai Chettiar and the respondent and a stranger would not be entitled to enforce it specifically. [See *Iswaram Pillai* v. *Taregan* (1) and *Jamna Das* v. *Ram Autar Pande* (2).] But the appellant's Pleader now maintains that Annamalai Chettiar was plaintiff's agent and that the Subordinate Judge found him in fact to be so. The District Judge pronounced no opinion on the question of fact whether Annamalai Chettiar was the plaintiff's agent or not. The plaintiff let in no oral evidence on the point and contended himself with

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(1) A.I.R. 1914 Mad. 701=23 I.C. 951.
(2) (1912) 34 All. 63=13 I.C. 304=39 I. A. 7 (P.C.).

relying on the documentary evidence of the *vartamanam* and *hundi*, the genuineness of which was not disputed.

We must set aside the District Judge's decree and direct him to take the appeal again on his file and to dispose of it in the manner we have indicated above. When the matter comes before the Court executing the decree, the question whether Annamalai Chettiar was the plaintiff's agent or not will be *res integra* so far as that Court is concerned and either party will thus be in a position to adduce evidence on the point, if so advised.

Though we have allowed the appeal, we recognise the fact that the appellant has secured an advantage which he lost by his negligence in not setting out his case properly and by not supporting it in the first Court by proper evidence. We do so by directing that in this Court he should bear his own and respondents' costs. The lower Court's order as to costs already incurred will stand.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 430

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Hassan Ammal Bibi and *others*—Plaintiffs—Appellants.

v.

Ismail Moideen Rowthar and *others*—Defendants and Plaintiffs—Respondents.

Civil Appeal No. 173 of 1913, decided on 30th March, 1915, against the decree of Tempy., Sub-Judge, Trichinopoly, in O. S. No. 4 of 1912.

(a) Civil P. C. (5 of 1908), Ss. 47, 65 and O. 21, R. 94—Assignee of a decree-holder auction-purchaser of undivided share is entitled to sue for partition without obtaining formal possession—Suit is not barred by S. 47.

An assignee of the interest of a decree-holder, purchaser of his judgment-debtor's right in a joint property, acquires title under S. 65 and O. 21, R. 94 and as such is entitled to bring a suit for partition against the judgment-debtor and his other co-owners without obtaining any formal delivery of possession and his suit is not barred by S. 47. [P. 430, C. 2.]

(b) Civil P. C. (5 of 1908), S. 65, O. 21, R. 96—Auction-purchaser is not confined to R. 96 he can sue for possession.

A purchaser at a Court sale in order to obtain possession of the property purchased may seek for such possession as he can obtain under the Civil P. C. or may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit. [P. 431, C. 2 & P. 432, C. 1.]

(c) Limitation Act (9 of 1908), Art. 144 applies to suit for partition even by auction-purchaser.

Article 144 applies to a suit for partition between tenants-in-common, although a tenant has acquired his rights by purchase at a Court auction. [P. 432, C. 2.]

In such a suit there can be no question of adverse possession, because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common.

T. Rangachariar—for Appellants.

S. T. Srinivasagopalachary—for Respondents.

Wallis, C. J.—The plaintiffs in this case claim under an assignment from the auction-purchaser at an execution sale of the 1st defendant's interest in certain property, which was in the enjoyment of the 1st and 2nd defendants as tenants-in-common. The sale took place on the 16th March, 1898 and was confirmed on the 21st April, 1898, and the sale certificate issued on the 22nd April, 1898. The present suit was brought on the 15th April, 1910, but it was only when it was amended on the 15th October, 1910, that it became a suit to enforce the plaintiff's rights as representatives of the auction-purchaser to partition the property to which they were entitled as tenants-in-common with the 2nd defendant. This date, therefore, must be regarded as the date of instituting the suit. The Subordinate Judge has dismissed the suit, as barred under S. 47, of the Code of Civil Procedure, on the ground that possession was never obtained under O. 21, R. 96 of the Civil Procedure Code, 1908, (S. 318 of the old Code). It is unnecessary to consider whether the section is applicable to a case where the judgment-debtor whose interest was purchased was in joint possession with a third party, because I think that the title having vested in the plaintiffs' assignor under S. 65 and O. 21, R. 94, they were entitled to bring the present suit without obtaining any formal delivery of possession. The decision in *Yelumalai Chetty* v. *Srinivasa Chetty* (1) was to this effect and it was the duty of the Subordinate Judge to follow it instead of indulging in idle speculations as to S. 318 not having been present to the mind of the learned Judges who decided

(1) (1906) 29 Mad. 294.

that case. That decision is also in accordance with *Khiroda Kanta Roy* v. *Krishna Das Laha* (2), *Ramlakhan Rai* v. *Gajadhar Rai* (*Gajadhar Rai* v. *Ramlakhan Rai*) (3) and *Bhagwant Singh* v. *Bhola Singh* (4). The Subordinate Judge has also held that the suit is barred under Article 137 of the Limitation Act, here again disregarding the recent ruling of this Court in *Duvvada Hari Kristna Chowdhary* v. *Sripada Venkata Lakshmi Narayana* (5) that Article 144 was the Article applicable, a decision which it was his duty to follow. It has not been attempted to support the Subordinate Judge's decision that the suit was barred under Article 137, as clearly at the date of the sale the judgment-debtor was not out of possession within the meaning of the Article. It has, however, been contended that as he was then in possession with the 2nd defendant as tenant-in-common, he was in possession at the date of the sale with him within the meaning of Article 138 and that that Article applies.

Now apart from *Yelumalai Chetty* v. *Srinivasa Chetty* (1), there is authority for holding that Article 138 will not apply when the defendant does not claim through or under the judgment-debtor. *Khiroda Kanta Roy* v *Krishna Das Laha* (2), *Bhagwant Singh* v. *Bhola Singh* (4). Here the 2nd defendant is not a person claiming through the judgment-debtor, the 1st defendant, and, therefore Article 144 and not Article 138 would be the Article applicable. I am, therefore, not prepared to differ from the decision in *Yelumalai Chetty* v. *Srinivasa Chetty* (1) and would allow the appeal, reverse the decree, give the plaintiffs a preliminary decree, for partition and remand the case to the lower Court for disposal according to law.

Seshagiri Aiyar, J.—One Ramaswami Iyengar obtained a decree against the 1st defendant and brought the plaint properties to sale and purchased them himself. Peer Mohideen, from whom the plaintiffs in this suit derive title, purchased the properties from the said Ramaswami Iyengar under Exhibit B on the 11th July 1898. Ramaswami Iyengar obtained his sale certificate under the Court sale on the 22nd April 1898, (Exhibit A). The 2nd defendant is the brother of the 1st defendant and the other defendants claim under the 2nd defendant. The plaintiffs sue for a partition of the properties and for the allotment of a half share to them. The defendants raised various pleas on the merits; they were all found against them by the Subordinate Judge, but he dismissed the plaintiff's suit on two grounds, namely, that the suit was not maintainable by reason of S. 47 of the Code of Civil Procedure, and that it was barred by limitation under Article 137 of the Limitation Act. In appeal Mr. Rangachariar contends that the lower Court is wrong on both the points.

I wish at the outset to point out that both the questions are covered by the decisions of this Court. In *Yelumalai Chetty* v. *Srinivasa Chetty* (1) Subramania Aiyar and Benson, JJ., held under similar circumstances that the suit was not affected by S. 244 of the old Code, which corresponds to S. 47 of the new Code. As regards the question of limitation, Sir Arnold White, C. J., and Munro, J., held that the proper Article applicable to suits of this nature is Article 144. The Subordinate Judge before whom these two cases were quoted, instead of following them, indulges in some criticism regarding their correctness. As I shall show presently the two decisions of this Court are perfectly sound. Even if it were otherwise, it was the duty of the Subordinate Judge to have followed them.

Now upon the first question as to whether S. 47 bars the suit, Mr. Srinivasagopalachariar contended that, as the purchaser in the Court sale and his successor-in-title did not take steps under O. 21, R. 96 of the Code of Civil Procedure, the plaintiffs were not entitled to maintain the suit. The contention of the learned Counsel amounts to this: that before the title under the sale certificate could be perfected, it was necessary to have applied for delivery of such possession as the Civil Procedure Code contemplates. I am unable to agree with this contention. Two courses are open to a purchaser at a Court sale. He may choose to avail himself of the remedy given to him by the Code of Civil

(2) (1910) 6 I. C. 467.
(3) (1911) 33 All. 224=5 I. C. 273.
(4) (1913) 35 All 432=18 I. C. 465.
(5) (1911) 34 Mad. 402=5 I. C. 491.

Procedure and seek for such possession as he can obtain under the Code ; or he may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit. It is conceded that under O. 21, R. 96, partition cannot be obtained. It is also conceded that the 2nd defendant cannot be compelled by proceedings in execution to give one-half of the property to the auction-purchaser. But it is argued that as the 1st defendant, the judgment-debtor, is a party to the present suit, S. 47 stands in the way of the plaintiffs obtaining their rights. I feel no hesitation in holding that that section does not apply to cases where the effectual remedy is to be obtained against persons who were not parties to the previous litigation. That was the view taken by this Court in *Yelumalai Chetty* v. *Srinivasa Chetty* (1). The decisions reported as *Kattayat Pathumayi* v. *Raman Menon* (6) and *Sandhu Taraganar* v. *Hussain Sahib* (7) are not against this conclusion. In these cases the only person against whom relief was sought was the judgment-debtor himself ; S. 244 was rightly held applicable to such cases. *Kishori Mohan Roy Chowdhry* v. *Chunder Nath Pal* (8) is in accordance with this Court's decision. As was pointed out by Petheram, C. J., in that case, "though there may be a remedy under S. 318 (corresponding to R. 96) which the auction-purchaser may put in force, still the ordinary remedies are open to him notwithstanding, and the remedies are concurrent." I entirely agree with this statement of the law. It is not necessary in this case to consider whether the auction-purchaser, when he happens to be the decree-holder, can be said to be a party to the suit. Different Courts have taken different views upon that point. In Madras there has been a long course of decisions which establishes that, where property is purchased at a Court sale by the decree-holder, he does not lose his status as a party to the suit. Even on that view the present contention cannot be said to arise between parties to the suit, because, as I have said before, the real remedy is sought against the 2nd defendant, the 1st defendant being only *pro forma* ; as the 2nd defendant was not impleaded in the former litigation, S. 47 is not a bar to the maintainability of this suit. Moreover, I am of opinion, although it is not necessary to express any definite conclusion on the point, that R. 96 has no application to cases of co-tenants. The rule itself speaks of the possession of *tenants* and others entitled to possession. These latter words would *prima facie* apply only to persons who claim possession in their own right, and not to those who are entitled to hold possession for themselves and for others.

Upon the second question all the Courts are agreed that Article 144 of the Limitation Act applies to a suit for partition between tenants-in-common, although the tenant has acquired his right by purchase at a Court auction. At first sight, I was impressed by the argument of Mr. Srinivasagopalachariar that the language of the Article 138 does not support the construction that in order to attract its provisions, the suit must be only against the judgment-debtor. But it has been considered in *Lakshman Vinayak Kulkarni* v. *Bisan Singh* (9), that unless the party resisting possession is either the judgment-debtor or somebody deriving title from him, the proper Article applicable will be 144.

The language of the latter Article is more comprehensive and would cover all cases where adverse possession is set up. Although it is true that Article 144 being the residuary Article should only be resorted to where there is no specific provision in the other Articles of the Act, it seems to me that the two Articles would overlap each other unless the earlier one is confined in its operation to suits against judgment-debtors alone, and the latter made to apply to other cases of adverse possession. There is the authority of Mookerjee, J., in *Khiroda Kanta Roy* v. *Krishna Das Laha* (2), in support of this proposition. *Gopal* v. *Krishna Rao* (10) is also to the same effect. The latest case upon the point is *Bhagwant Singh* v. *Bhola Singh* (4). The decision in *Duvvada Hari Kristna Chowdhary* v. *Sripada Venkata Lakshmi Narayana* (5) must be taken to have adopted this series of decisions in the

(6) (1903) 26 Mad. 740.
(7) (1905) 28 Mad. 87.
(8) (1887) 14 Cal. 644.

(9) (1891) 15 Bom. 261.
(10) (1901) 25 Bom. 275.

other Courts. I am, therefore, of opinion that Article 144 applies to this suit. If it does, there can be no question of adverse possession, because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common; and unless and until the co-tenant in possession sets up notoriously a right adverse to the other claimants there can be no adverse possession. Even if Article 138 applies, I am of opinion that having regard to the acknowledgment of right made by the 1st defendant in Exhibits F and K in 1898 and 1902 respectively the suits will not be barred by limitation. It is necessary to point out that the Subordinate Judge's view that Article 137 applies was not sought to be supported in this Court. Mr. Srinivasagopalachariar based his argument on Article 138.

The decree of the Subordinate Judge must be reversed and a preliminary decree for partition must be passed in this court. The case will be remanded to the Lower Court for passing a final decree. The costs will abide the result.

S.N./R.K.

Decree reversed; Case remanded.

A. I. R. 1916 Madras 433

OLDFIELD AND SADASIVA AIYAR, JJ.

Kayarohana Chettiar—Defendant—Appellant.

v.

Nagalinga Chettiar—Plaintiff—Respondent.

Letters Patent Appeal No. 299 of 1914, decided on 16th July, 1915, against the judgment of Seshagiri Aiyar, J., reported in A. I. R. 1915 Mad. 80.

Provincial Small Cause Courts Act (9 of 1887), S. 25—No interference can be made in revision if definite finding is given about sufficiency of caution exercised under Contract Act (9 of 1872), S. 151.

The standard of caution and care prescribed in S. 151 of the Contract Act is a question of fact, and where a subordinate Court has given a definite finding on it, a High Court cannot in the exercise of its powers of revision, under S. 25 of the Provincial Small Cause Courts Act, reverse that finding.

Thomas Giblin v. *McMullen*, (1868) 2 P. C. 317; 9 I. C. 169; ref. to. [P. 434, C. 1.]

G. S. Ramachandra Aiyar—for Appellant.

T. V. Venkatarama Aiyar—for Respondent.

Oldfield, J.—The plaintiff entrusted his bundle, containing Rs. 430, to the 1st defendant to be kept whilst the two went to a godown ten feet distant for a short time. The 1st defendant put it in an unlocked box, in which he had money of his own. When the two went away the 1st defendant's nephew was in the shop, though he was not actually asked to mind it. On the return of the plaintiff and the 1st defendant the money was gone. The Subordinate Judge held that the 1st defendant was not negligent and dismissed the plaintiff's Small Cause suit. A learned Judge of this Court revised this decision, passing the decree for the plaintiff which is before us on appeal. The facts stated above are all that are material, except perhaps what the learned Judge and the Subordinate Judge have not referred to, though they doubtless had it in mind, that there is no allegation in the plaintiff's evidence of his having told the 1st defendant anything regarding the amount of the money entrusted.

It is, no doubt, the case that this Court has before now interfered in revision with Small Cause decrees, based on a flagrant misinterpretation or disregard of evidence. But we do not understand the learned Judge to have done so in this case or to have based his judgment on anything except what he held to be the lower Court's mistake of law.

That mistake was, as we understand him, not its adoption of the measure of care actually taken by the 1st defendant to preserve his own money in the box as the test, by which his conduct in connection with the plaintiffs had to be tried, instead of the care which a man of ordinary prudence would take, as S. 151 of the Indian Contract Act prescribes. For he refers to the former only in connection with an argument advanced in support of the lower Court's judgment, not in connection with the judgment itself. The learned Judge's ground of decision was that negligence was not established and he treated this as matter of law, because it involved an inference from the facts found.

With all due respect we do not think this sustainable. There are no doubt cases

such as *Thomas Giblin* v. *McMullen* (1), in which the question whether there is any evidence of negligence is dealt with as one for the Judge, not the Jury; and there are others in which the question, whether proof of gross negligence or ordinary negligence was necessary and had been given, was treated as one of law. But the present case does not resemble them and we have been shown nothing in support of the general proposition which the learned Judge's judgment involves. The Subordinate Judge, as his judgment shows, tested the 1st defendant's conduct with reference to the proper standard, that is prescribed in S. 151 of the Indian Contract Act, the care which a man of ordinary prudence would take in similar circumstances; and it is not shown that he made any mistake in applying that test. The result of his application of it must then be accepted as final.

In these circumstances we must allow the Letters Patent Appeal, set aside the decision under appeal and restore that of the Subordinate Judge. The respondent will pay the appellant's costs in this Court.

Sadasiva Aiyar, J.—I agree. It is not shown that the Subordinate Judge misunderstood the law or that the inference of fact at which he arrived, namely, that there was no such negligence on the part of the 1st defendant as a man of ordinary prudence acting in respect of his own affairs might have acted as the 1st defendant did is a perverse finding of fact. Nor is it shown that the only possible inference on the facts proved was the contrary inference. [See *Sreemant Raja Yerlagadda Mallikarjuna Prasada Naidu Bahadur* v. *Rayapati Venkata Vasudeva Row* (2).]

Appeal allowed.

(1) (1868) 2 P. C. 317 = 5 Moore P. C. 434.
(2) (1911) 9 I. C. 169.

A. I. R. 1916 Madras 434

AYLING AND TYABJI, JJ.

Ramaswami Moopan—Plaintiff – Appellant.

v.

Srinivasa Iyengar – Defendant – Respondent.

Second Appeal No. 1691 of 1913, decided on 2nd February, 1915, from the decree of Tempy., Sub-Judge, Tanjore, in Appeal Suit No. 474 of 1912.

Civil P. C. (5 of 1908), O. 21, Rr. 46 and 54—Difference between attachment under Rr. 46 and 54 pointed out—Payment to sub-mortgagee by mortgagor after attachment of mortgagee's rights held not invalid.

In a suit for declaration that plaintiff was the full owner of certain properties, it appeared that plaintiff was the transferee-in-interest of the original owner who had mortgaged them to one *S*. The mortgagee's interest passed to his son *C* and the defendant got it attached before judgment on 14th August, 1904. *C* in September 1910 sub-mortgaged it to *K* whom the plaintiff redeemed in September 1911. The attachment was effected under S. 274 of the old Code corresponding to O. 21, R. 54, of the new Code and was duly confirmed and the property brought to sale. It was contended that the payment having been made after the attachment was void:

Held, that the attachment ought to have been made under S. 268 of the old Code (O. 21, R. 46 of the new Code) and not having been so made, it did not affect the plaintiff's right as no notice of the attachment was served upon him.

[P. 435, C. 1 & P. 436, C. 2.]

Difference between the two modes of attachment under Ss. 268 and 274 explained.

[P. 435, C. 1.]

S. Muthiah Mudaliar for Appellant.

C. V. Ananthakrishna Aiyar – for Respondent.

Judgment.—The question involved in this appeal is whether the plaintiff is entitled to claim that he has a subsisting usufructuary mortgage on the properties referred to in the plaint, or whether the 2nd defendant can claim that he has acquired not only the equity of redemption, but also the mortgagee's interest. The decision of this question depends upon whether the mortgagee's interest in the property was validly attached and sold in execution or whether the attachment was invalid. After the alleged attachment of the mortgagee's interest upon which the defendant relies, the plaintiff paid off the mortgage amount and purported to redeem the property. The plaintiff claims that the redemption was valid as the attachment was invalid; and the defendant claims that the alleged redemption was void under S. 64 of the new Code of Civil Procedure, as the property had been attached prior to the alleged redemption.

The learned Pleader for the defendant relied upon the terms of S. 64 of the new Code of Civil Procedure and invited us to hold that inasmuch as the section does

not state that the attachment referred to therein must be a valid attachment, it is immaterial whether or not it is valid; that the payments therein referred to must be held to be void as soon as an attachment is purported to be made, irrespective of the validity of the attachment. We are unable to accede to this argument as stated. It is unnecessary in the present case to consider whether the section cannot operate if there is any irregularity whatsoever in the attachment. It may be that some irregularities may not vitiate the attachment for the purposes of S. 64 of the new Code of Civil Procedure. But in the present case the alleged cause of invalidity cannot be described as a mere irregularity as between the parties now before us. The attachment must be held to be either entirely void or entirely valid.

The contention of the plaintiff is that the interest of the usufructuary mortgagee was attached as though it was immovable property under S. 274 of the old Code of Civil Procedure, 1882, (O. 21, R 54, of the present Code); and that it ought really to have been attached as a debt under S. 268 of the old Code of Civil Procedure (O. 21, R. 46, of the present Code). The substantial difference between the two modes of attachment (so far as at present material, is that under S. 268 the mortgagor would have received a written order of the Court prohibiting him from making the payment to the mortgagee; and under S. 274 he received no such order, nor any notice of the attachment. The mortgagor, therefore, can reasonably claim that the payment which he has made in ignorance of the attachment cannot be held to be void, if he was entitled to proceed on the basis that there was no attachment of the mortgagee's interest, because if there had been an attachment in the form in which the law entitled him to expect it to be made, he would have been prohibited from making the payment, and he was not so prohibited.

The question may, therefore, be considered in the following form: Is the mortgagor entitled to receive notice of any attachment of his usufructuary mortgagee's interest? And in the absence of such notice, is he entitled to redeem the mortgage by paying off the amount due or will any payments he makes be invalid as against an attaching creditor of the mortgagee?

It is admitted that in the case of a simple mortgagee (as distinguished from a usufructuary mortgagee) the proper mode of attachment is that applicable to a debt (S. 268 of the old Code of Civil Procedure, now O. 21, R. 46, of the new Code of Civil Procedure), but it is urged that the case is different when the mortgage is usufructuary. Some support is given to this argument by the decision in *Manilal Ranchhod* v. *Motibhai Hemabhai* (1); on the other hand *Chullile Peetikayil Nammad* v. *Othenam Nambiar* (2) (to which one of us was a party) is relied upon by the plaintiff. In our opinion there is no conflict in the *ratio decidendi* of each of these cases: *Manilal Ranchhod* v. *Motibhai Hemabhai* (1) proceeded on the assumption that on the true construction of the deed then before the Court there was no debt which the mortgagee was entitled to recover at the time of the attachment; and consequently a person who claimed to have acquired from the mortgagee a right which the mortgagee himself did not possess, could not claim to be put in possession of property as collateral security for a debt which did not exist. When in accordance with the document the mortgagee cannot claim to recover any debt from the mortgagor nor the mortgagor, claim to make any payment to the mortgagee it would seem that the attachment of the rights arising under such a document cannot take the form contained in O. 21, R. 46, of the Code of Civil Procedure, (S. 268 of the old Code of Civil Procedure); for that form consists of prohibitions from making and receiving payments; it would be meaningless to prohibit persons from making and receiving payments when their relationship is such that no payments are contemplated. On the other hand the decision in *Chullile Peetikayil Nammad* v. *Othenam Nambiar* (2) proceeds on the basis that when there is a debt payable by the mortgagor, the fact that the mortgagee is in possession of the land does not the less make it a debt, nor is the mode of attachment of such debt affected by the collateral security for such debt, even though that security

(1) (1911) 35 Bom. 288 = 10 I. C. 812.
(2) A. I. R. 1915 Mad. 551 = 26 I.C. 508.

may take the form of possession of the property.

We have, therefore, to determine in this case, *first*, whether there was any debt which ought to have been attached as such; and *secondly*, whether on failure of any such attachment, the payment on which the plaintiff relies can be considered to have transferred the mortgagee's rights to him.

The mortgage in question was no doubt usufructuary. It, however, provided for redemption on 12th April, 1898: and the mortgagor promised to the mortgagee: "we shall pay to you the principal of the mortgage amount and we shall redeem the said lands clear of *Sirkar teerwai*. Further after discharging (the loan) as above, we shall get back the mortgage-deeds and other documents 8, in number, which we have obtained and given to you. Should we fail to pay you the principal of the usufructuary mortgage amount on the said due date, we shall, on your demanding it of us within the 1st of the month of *Chittrai* in any year, pay you the said amount and redeem the mortgage." At the time of the attachment, therefore, *viz.*, on 14th August, 1904, the mortgagor had already become bound to re-pay the mortgage debt, and had in any case a right to pay it and to demand possession of the mortgaged property. Hence it is clear that there was such a right to receive payment if it was offered as could have been attached and if the attaching creditor desired that the payment should be made to him, he should have obtained an order of the Court prohibiting the mortgagor from making the payment to the mortgagee: S. 268 of the old Code of Civil Procedure.

Secondly, the learned Pleader for the appellant forcibly pointed out in argument if the attachment be taken to be that of the mortgagee's collateral security by way of being in possession of immoveable property till his debt is paid, then assuming that the attachment was valid the attaching creditor acquired merely that precarious interest in immovable property by attaching under S. 274 of the old Code of Civil Procedure; and the defendant cannot claim to have any right to be in possession of the property (for that is all the right that he can claim) as security for a debt which has now been paid off.

It was contended for the defendant that there could not be said to be a debt capable of being attached, as the mortgagee's personal rights had become barred at the date of the attachment. But assuming that at the date of the attachment the mortgagee could not have obtained any relief on his mortgage-deed except possession of the property, it does not affect the mortgagor's right to pay off the mortgagee and to obtain possession of the property, nor the corresponding right of the mortgagee to receive payment prior to giving up possession. These reciprocal rights were not barred by limitation and the attachment could not affect them. The appeal will, therefore, be allowed. The suit will be remanded to the Court of first instance for disposal on the other issues. Costs will abide the result.

S. N./R. K.

Appeal accepted.

A. I. R. 1916 Madras 436

SANKARAN NAIR AND SESHAGIRI AIYAR, JJ.

Udayal—Plaintiff—Appellant.

v.

A. L. A. R. R. M. Arunachala Chettiar and *others*—Defendants—Respondents.

Second Appeal No. 1297 of 1913, decided on 22nd December, 1914, from the decree of Dist., Judge, Ramnad, in Appeal Suit No. 897 of 1911.

(a) Madras Estates Land Act (1 of 1908), Ss. 4 and 12—Condition of no rent for fallow land if supported by custom is valid.

A tenant is bound to pay rent upon every portion of his holding, whether he cultivates it or not, but is subject to any custom which may be proved to exist in particular localities. [P. 438, C. 1.]

Where, therefore, a custom not to charge any rent for the lands which are allowed to lie fallow by the tenants exists, a term in a *patta* to that effect is not improper. 9 I. C. 41; 12 I. C. 566; dist. A. I. R. 1915 Mad, 446, Foll. [P. 437, C. 1 & 2.]

(b) Madras Estates Land Act (1 of 1908), Ss. 4 and 12—If tenant taps for toddy he is liable to pay tree tax in addition to rent but not when they only put forth spathes.

Prima facie, a tenant who pays rent for a land should not be taxed twice over for trees standing on the land unless he derives special benefit from them. [P. 438, C. 1.]

Therefore, a separate tree tax on palmyras should be levied only when they are tapped for toddy, and not when they merely put forth spathes. [P. 438, C. 1.]

A. Sundaram—for Appellant.

S. Sundararaja Iyengar—for Respondents.

Facts.—The suit was by a tenant for the grant of a proper *patta* by the landlord. The points in dispute were whether the landlord was entitled to levy rent on lands allowed to remain fallow for a season, and whether a tenant was liable to pay tax for palmyra trees standing on land for which rent is being paid and if so, from what period of time, whether from the time they are tapped for toddy or at any previous stage. The Sub-Collector of Ramnad held that a custom existed in the Ramnad *zemindari* to which the suit lands appertained for tenants occasionally to allow a portion of their holding to remain fallow and for the landlord not to charge rents for such portions and that the landlord was entitled to levy tree tax only from the time the trees were tapped and that till then he was entitled to rent for the land alone. On appeal the District Judge held that though the custom set up was true it was unreasonable, that the tenant was liable if he negligently allowed the land to remain waste and that the tenant was liable to pay tree tax from the time the trees put forth spathes. The tenant appealed to the High Court and the landlord also filed a memorandum of cross-objections.

Judgment.—The plaintiff who is a tenant sued for the grant of a proper *patta* to him by the landlord. He took various objections to the one tendered by the defendant (Exhibit VI). The Sub-Collector modified its terms in some respects. On appeal, the District Judge reversed that decision with reference to two of the disputed terms. This second appeal and the memorandum of objections relate to them.

The first point for decision is whether waste dry lands included in a tenant's holding are not chargeable with rent. The Sub-Collector, after discussing the evidence in the case, came to the conclusion that it is the custom in the *zemindari* of Ramnad not to charge any rent for lands which are allowed to lie fallow by the tenant. The District Judge on appeal accepts this finding and says: "The evidence shows that waste has not been charged before." However, he considered it to be unreasonable that the tenant should be at liberty to allow lands to remain uncultivated and directed the *patta* to be amended "so as to make it clear that waste should be charged only if due to the *ryot's* neglect." We are unable to agree with this conclusion. There is nothing unreasonable in a tenant occasionally leaving a certain portion of his holding uncultivated. *Prima facie* the tenant would be very anxious to cultivate every field included in his *patta*. It is more to his interest than to that of the landlord to do so. If any portion of his holding remains waste, it must be due to circumstances beyond his control. The defendant's Vakil has not asked us to provide against allowing lands to remain waste for a number of years continuously. That by itself would be evidence of wilful default for which provision, if claimed by the landlord, may have to be made. Such a question does not arise for decision before us. The suggested amendment by the District Judge would lead to a great deal of abuse. It is not possible to predicate accurately what would amount to wilful default or neglect on the part of the *ryot*; this clause would lead to unnecessary litigation and to the embitterment of feelings between the landlord and the *ryot*. As regards decided cases, in the case of *Nagu Chetti* v. *Bhaskara Sethupathi* (1), relied upon by the District Judge, the question as to whether by the custom of the *zemindari* the tenant can allow a portion of his holding to remain occasionally uncultivated was not considered. No such custom was apparently set up or found in that case. The other decision relied upon by the District Judge is that of *Kadir Mohideen* v. *Alagappa Chettiar* (2). In that case all that was decided was that a clause imposing liability on the tenant to pay rent on waste land if cultivated by him was reasonable. Apparently the waste land was not included in the holding and the provision to the effect that if the tenant encroaches upon neighbouring waste lands of the landlord and cultivates them he should pay *tirva*, is a very proper provision. On the other hand in *Arunachellam Chettiar* v. *Muthayanai Thevan* (3), which related to the Ramnad *zemindari*, the learned Judges

(1) (1911) 9 I. C. 41.
(2) (1911) 12 I. C. 566.
(3) A. I. R. 1915 Mad. 446=25 I. C. 675.

came to the conclusion that there was nothing unreasonable in the custom which gave liberty to the tenant to allow a certain portion of his holding to remain occasionally uncultivated. In Second Appeal No. 445 of 1912, although the decision was with reference to lands in the same *zemindari*, the learned Judges did not consider any question of usage.

In the argument before us S. 4 of the Estates Land Act was relied upon as indicating that the tenant is bound to pay the rent upon every portion of his holding, whether he cultivates it or not. This general provision is subject to any custom that may be proved to exist in particular localities. On the whole our conclusion is that the decision of the Sub-Collector is right and that the District Judge's suggestion to amend the *patta* should not be upheld.

The second point argued relates to tree tax, *i e.*, tax on palmyras. In the plaint it was admitted by the tenant that it was usual to pay the tax for the palmyra trees which are tapped for toddy. Having regard to this admission the Sub-Collector came to the conclusion that until a tree is tapped the landlord is only entitled to the rent upon the land on which the tree grows and that he is not entitled to any tree tax. The District Judge on the other hand has come to the conclusion that the moment that a palmyra tree puts forth spathes, it should be taxed. We think this is not correct. *Prima facie* the tenant who pays rent for the land should not be taxed twice over unless he derives any special benefit from the trees standing on the land. This is the correct view having regard to the provisions of S. 12 of the Estates Land Act, which reserves considerable rights to the tenant in the trees growing on his holding.

We must, therefore, reverse the decision of the District Judge on the two points mentioned above.and restore that of the Sub-Collector. This disposes of the memorandum of objections as well. Appellant will have his costs in.this and in the lower Appellate Court.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 438

OLDFIELD AND NAPIER, JJ.

C. Krishnamachari—Accused.

v.

Shaw Wallace and Company—Complainant.

Criminal Rev. No. 168 of 1915 and Case Referred No. 15 of 1915, decided on 9th April, 1915, made by 3rd Presdy. Magte., George Town, in his Letter R. O. C. No. 132 of 1915.

(a) Interpretation of Statutes—Special provision is not generally affected by general provisions.

According to the ordinary canons of construction, a special provision should ordinarily receive effect unqualified by the general. [P. 439, C. 1.]

(b) Criminal P. C. (5 of 1898), S. 179—When S. 179 applies stated—Offence of breach of trust is cognizable by Court where loss has occurred.

S. 179 can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done.

[P. 439, C. 2 & P. 440, C. 1.]

It is the Court within whose jurisdiction the primary loss takes place that can take cognizance of the offence of criminal breach of trust.

[P. 440, C. 1.]

Where, therefore, the accused was appointed agent for the sale of the complainant's oil at Nandyal and used to send periodical reports to his principal at Madras showing the quantity of oil sold and the amount of money received, but after a certain time failed to do so and left his place of business and made away with the money.

Held, that inasmuch as the misappropriation was only of the money received and the loss primarily ensued to the complainant as a consequence of the accused's conduct at Nandyal, the Court of the Presidency Magistrate at Madras had no jurisdiction to try the case. [P. 440, C. 1.]

R. N. Aingar—for Accused.

T. Richmond—for Complainant.

Oldfield, J.—The question on this reference is whether the third Presidency Magistrate has jurisdiction to try the accused for an offence punishable under S. 406 or 409 of the Indian Penal Code, or whether he should return the complaint for presentation to a competent Court at Nandyal, Kurnool District.

The circumstances are set out in the complaint only generally. But the material allegations appear, from the evidence already taken and the statements of complainant's Counsel, to be that the accused

was appointed agent for the sale of complainant's oil at Nandyal, that his periodical reports showed a certain quantity of oil sold and a certain sum of money received and (after deduction of commission, etc.) to be accounted for and that, when called on to account, the accused failed to do so, leaving Nandyal after locking up his place of business and secreting his books, the inference being that he had made away with the funds in his charge. No suggestion is made that any oil entrusted to him has been converted to his use or dealt with otherwise than in accordance with complainant's instructions; that is, by sale to customers. The misappropriation relied on is accordingly not of the oil, but only of the money received for it; and we can, therefore, dismiss from consideration what seems to have been thought material before the Magistrate, the allegations as to the origin of the oil whether it came from Madras or Cocanada. The fact that the accused was appointed agent by an order sent from Madras is also without significance in a criminal case. The only ground which we have to consider as justifying the jurisdiction of the Madras Court, is that loss ensued there to the complainant firm as a consequence of the accused's conduct at Nandyal and that the case is, therefore, covered by S. 179, Criminal Procedure Code, not by S. 181 only, in which offences under Ss. 406 and 409 are specially dealt with. In accordance with the ordinary canons of construction the special provision should ordinarily receive effect unqualified by the general. Clear reason must, therefore, be shown in the wording of S. 179 or otherwise before complainants' contention can be accepted.

That contention has been endorsed and negatived in different decisions; but, though in some of them attempts have been made to state the principle applicable in more or less general terms, the weight of such statements is impaired by the fact that either the allegations before the Court and the exact relations between the parties are not stated fully in the reports or the conclusion may have been influenced by uncertainty regarding the place in which the money or property concerned was received or converted by the accused. *Rajani Binod* v. *All India Banking Company* (1) is an instance of the former class of cases, and *George Langridge* v. *Grace Atkins* (2) of the latter.

In this Presidency *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari* (3), no doubt, supports both the propositions which the prosecution has to establish, that (1) the offence is constituted by the accused's dishonest conversion and the loss which ensued as its consequence, and (2) such loss ensues not only where and when the conversion takes place, but also where the complainant ordinarily receives the accused's accounts and remittances. In the case of *Rambilas In re* (4), however, two other learned Judges did not feel compelled to treat this as a considered ruling on the point; and with all due deference we follow them so far. Their decision, however, negatived the first of the propositions above stated, on the ground that the existence of dishonest intention, not the ensuing of loss, was the essential element in the offence of criminal breach of trust and that there was, therefore, no question of any consequence or of the application of S. 179; and we respectfully dissent from this view. For, we are unable to conceive, and the learned Counsel has been unable to suggest, any case in which more than mere preparation or attempt could be held established but no loss whatever, it may be only a temporary or highly insignificant one, could be found to have been caused. Our conclusion is in fact that the loss ensues immediately on the conversion, because by it the property of the principal, entrusted to the agent, is diminished in the latter's hands. It is the complainant firm's case that accused's collections (less commission) belonged to it from the date of receipt, and it is not alleged that any appropriation was necessary to change their ownership. The date of conversion may be uncertain and susceptible of no more definite statement than as prior to the proper date for remittance. That, however, cannot alter the fact that the firm's funds in Nandyal were diminished. It follows that primarily at least it suffered wrongful loss there.

Complainant's *second* proposition stated above is clearly essential to his contention. For S. 179 can be applied only

(1) 22 I.C. 192; 17 C.W.N. 1207.

(2) (1913) 35 All. 29=17 I.C. 792.
(3) A. I. R. 1914 Mad. 330=22 I.C. 991.
(4) 26 I. C. 136; (1914) M.W.N. 894.

to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done. It has been supported with reference to the present case on the ground that, although the firm's loss at Nandyal may have been a primary consequence, the loss at Madras the firm's head-quarters where its funds are kept, was a secondary one and was sufficient to attract the operation of the section. This distinction is not recognised explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *George Langridge* v. *Grace Atkins* (2) as the foundation of the decision in *Ganeshi Lal* v. *Nand Kishore* (5) on which the accused relies; and it was not drawn in the former case, because the assessments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Miru* v. *Jethabhai Amirbhai* (6) where the act in question was a complete causing of grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not affect the venue. We follow these authorities and hold that the complainant firm's secondary loss at Madras will not give the third Presidency Magistrate jurisdiction. He must return the complaint for presentation to a competent Magistrate having jurisdiction over Nandyal.

Napier, J. – I concur.

S. N/R. K.

Petition allowed.

(5) (1912) 35 All. 487=15 I. C. 319.
(6) (1906) 8 Bom. L. R. 513.

A. I. R. 1916 Madras 440

SADASIVA AIYAR AND NAPIER, JJ.

In re *A. L. A. R. R. M. Arunachalam Chettiar*—Plaintiff—Appellant.

Second Appeals Nos. 1553 to 1597 of 1915, decided on 1st September, 1915, from the decrees of Dist. Judge, Ramnad, in Appeal Suits Nos. 109, 108, 110, 159, 112, 113, 116 to 119, 121 to 123, 160, 124, 126, 128 to 131, 133 to 139, 161, 140 162, 141, 163, 142 to 145, 147 to 151, 158, 152, 155 to 157, 172 to 174 to 177 of 1914.

(a) Madras Estates Land Act (1 of 1908), S. 4 —S. 4 does not bar plea of exemption of rent of portion left fallow by custom.

Section 4 of the Madras Estates Land Act does not debar a tenant from claiming that by agreement and custom he is not liable to pay rent for the portion of his holding left fallow. A. I. R. 1914 Mad. 200 Foll. [P. 440, C. 2.]

(b) Civil P. C. (5 of 1908), O. 6, R. 17—Suit against dead person cannot be amended to show as one against his legal representative—Civil P. C. (1908), O. 1, R. 10.

A Court has no jurisdiction to allow the amendment of a plaint directed against a dead man into one against his legal representative and decide the suit as brought against the latter instead of the dead man. 31 Mad. 86 Foll.
[P. 440, C. 2 & P. 441, C. 1.]

A. Krishnaswami Aiyar—for Appellant.

Judgment.—Two questions are common to most of these second appeals and they are:—

(1) Whether the *zemindar* (appellant) is entitled to charge 12 *fanams* per *kurukkam* on dry lands as rent or only 10 *fanams*?

(2) Whether he is entitled to levy rent on the dry area left waste without the tenant's negligence:

The *first* question has been decided as a question of fact by the District Judge and we can see no grounds for interference on second appeal with that finding, which has been based on a consideration of the whole evidence.

On the *second* question the appellant's learned Vakil Mr. A. Krishnaswamy Aiyar) relied on S. 4 of the Estates Land Act for his contention that neither custom nor contract could deprive the *zemindar* of his right to charge rent on the area left uncultivated. But the case reported as *Segu Rowthen* v. *Alagappa Chetty* (1) and the decisions in Second Appeals Nos. 1244 and 1245 of 1913 of this Court have held that agreements and customs entitling the tenants to claim non-liability for rent on the area left fallow can be successfully set up notwithstanding S. 4 of the Estates Land Act.

In one of the second appeals before us the question is whether, when the plaint was directed against a dead man and the plaint was afterwards amended as a plaint against his living legal representative, the Court had jurisdiction to treat

(1) A.I.R. 1914 Mad. 200=22 I. C. 834.

the suit as one brought against the legal representative and decide it on that footing. *Veerappa Chetty* v. *Tindal Ponnen* (2) is clear authority against the appellant and we follow it.

There are additional questions involved in those second appeals which have been filed against the decisions in Appeal Suits Nos. 128, 146, 158, 159 to 163 and 118 of 1914 on the file of the District Court. But those questions are questions of fact, namely, whether the tenants had raised second crops on their lands, whether certain lands are dry or wet, and what is the proper rate for plaintain cultivation. They have all been decided on admissible evidence against the appellant.

We, therefore, dismiss the second appeals.

S. N./R. K.

Appeals dismissed.

(2) (1908) 31 Mad. 86.

A. I. R. 1916 Madras 441

SANKARAN NAIR AND AYLING, JJ.

Devi Bhuknoji Kasidoss Subbaraya Devage Garu and *others*—Defendants—Appellants.

v.

Allamadugu Narayana Reddi and others - Plaintiffs Respondents.

Second Appeals Nos. 2318 to 2330 and 2332 to 2345 of 1912, decided on 17th December, 1914, from the decrees of Dist. Judge, North Arcot, in Appl. Suits Nos. 419, 415 to 418, 420 to 427 and 429 to 442 of 1911.

(a) Madras Estates Land Act (1 of 1908), S. 13 (3)—Inamdar must admit inam to be estate before taking proceedings—S. 13 (3) would not apply if contract extinguishing right subsists—Payment of rent for 7 years is not sufficient to extinguish right.

An *inamdar* cannot take proceedings under the Estates Land Act and say at the same time that his *inam* is not an "estate" under the Estates Land Act. [P. 441, C. 2.]

A *ryot* will become disentitled to the benefit of S. 13 (3) of the Estates Land Act only if he had contracted himself out of his rights by a contract actually in force. 27 I. C. 688, Ref. to. [P. 441, C. 2 & P. 442, C. 1.]

Payment of rent for seven years at the enhanced rate proves merely an agreement and not a contract when there is no consideration in support of it. [P. 442, C. 1.]

A. Nanabhoy Devay and *Krishnaswami Aiyar*—for Appellants.

L. A. Govindaraghava Aiyar—for Respondents.

Judgment.—It is first argued that the lower Courts had no jurisdiction to entertain the suits as the lands do not form part of an estate under the Madras Estates Land Act. This objection was not taken in the Court of first instance. The appellant, an *inamdar*, has treated the lands as part of an "estate" by taking proceedings under the Act and there is certainly no presumption that an *inamdar* is entitled to both the *melvaram* and the *kudivaram*. If there is any presumption in this case, it is that the *inamdar* is entitled only to the *melvaram*. We, therefore, disallow this contention.

The appellant is a land-holder who was receiving rents from his *ryots* at a certain rate for his *manavari* (rain-fed) lands. The tenants constructed wells on their lands and with water from those wells, they raised garden crops, for which the appellant for some years demanded and received rent at a higher rate. The tenants now refuse to pay rent at such enhanced rates. The question is whether the landlord is entitled to claim it.

The lower Appellate Court has decided that the landlord is not so entitled under S. 13, clause 3, of the Estates Land Act.

The appellant contends this section does not apply and relies upon the judgments in *Venkata Perumal* v. *Ramudu* (1), In those cases, however, it was found that there was a contract between the parties that rent should be paid at the higher rate when land was cultivated with well-water. In the cases before us the appellant alleged that there was a *cist* rate and when it was reduced and he collected the *vasul* rate, it was under an agreement that if garden crops were raised with well water he should be paid the *cist* or *taram* assessment. This agreement has not

(1) (1915) 27 I. C. 688.

been proved. The case, therefore, does not apply.

It was then argued that the plaintiff is entitled to the *varam* rate of rent. But there was no attempt to prove in this case that there is an established *varam* rate or that the plaintiff is entitled to recover at that rate in the absence of any contract.

It is also said that under Ss. 27 and 28 of the Madras Estates Land Act it should be presumed that the rent which was paid during the preceding *Fasli* must be presumed to be the fair rate. The appellant did not contend in the lower Courts that he was entitled to recover the amount as being a fair rent. It has been found by the Courts that the crops were raised with water from the wells constructed at the tenants' expense, and it is not shown why the appellant should get any share of the higher value of the crops raised.

Payment for a period of seven years may be evidence of an agreement, but it will not be a contract unless there is any consideration for it and on the facts found, there is no consideration.

We dismiss the second appeals with costs.

S.N./R.K.

Appeals dismissed.

A. I. R. 1916 Madras 442

SESHAGIRI AIYAR AND NAPIER, JJ.

Anantha Desikachariar and *others*—Plaintiffs—Appellants.

v.

Viswanadha Mudaly and *others*—Defendants—Respondents.

Second Appeal No. 181 of 1913, decided on 6th August, 1915 from the decree of Sub-Judge, North Arcot, in Appeal Suit No. 96 of 1911.

(a) Easement Act (5 of 1882), S. 15—Person enjoying easement for even less than statutory period can sue trespasser.

A person having had enjoyment of an easement for less than the statutory period can obtain an injunction against a trespasser. 5 M. L. J. 24 and 34 Mad. 178, Foll.

[P. 443, C. 1.]

(b) Easement Act (5 of 1882), S. 15—Non-user for some time by person using an easement with permission can sue and restrain defendants trespassers.

Where the plaintiffs had been taking water with the permission of the Government to a tank along a channel which mostly ran through Government *poramboke* lands, but had for some years prior to suit not used this channel, on a suit being brought for declaration of their right against the defendants trespassers:

Held (1) that the non-user by the plaintiffs did not disentitle them to the relief claimed by them against the defendants who had no right either by grant or by prescription; [P. 443, C. 1.]

(2) that the plaintiffs were entitled to a decree restraining the defendants from interfering in any way with the plaintiffs in their enjoyment of the channel and of the water flowing in it.

[P. 443, C. 2.]

T. Rangachari and *C. V. Anantha-krishna Aiyar*—for Appellants.

K. Raja Aiyar, *Srinivasa Aiyangar* and *O. P. Venkataraghavachari* for *V.C. Seshachariar*—for Respondents.

Facts.—The plaintiffs were the inhabitant of Pundi Village and the defendants of Chinnsamudram and Gudimallore in North Arcot. The plaintiffs sued for a declaration thay they were entitled to take water from river .Palar through the Pundi channel. The defendants set up a grant from Government of the water of this channel and said that the plaintiffs and by non-user lost their rights. The District Munsif of Ranipet dismissed the suit. On appeal, the Subordinate Judge held that the channel was the channel of the plaintiffs and they were taking the flood water of the Palar river through this channel, but they had not taken the spring water of the said river for the last 30 years. He accordingly gave a decree declaring their right to take flood water, and dismissed the suit so far as the spring water was concerned, directing the plaintiffs to pay the defendants' costs as spring water was an important subject of discussion between the parties. The present appeal is against that decree and judgment.

Judgment. The Subordinate Judge has found that the plaintiffs dug the channel in the bed of the Palar river, that with the permission of the Government they have been taking water to the Pundi tank along a channel which mostly run through Government *poramboke* lands and which during the remainder of its course passed through channel *poramboke* lands. He has also found that up to 1862, the plaintiffs took both both spring and fresh water to their tank through this channel but that after 1862

and till 1892, they have not been shown to have removed the silt so as to enable spring water to pass through it. The defendants' case is that the Government made a grant of the right to take water through this channel to their fields as the plaintiffs did not require it any longer. The Subordinate Judge has found against this case. Apart from the fact that Exhibits III and IV purport to be grants to certain individuals only of the right in question, there is Exhibit G which shows that these grants were not acted upon, even assuming that it was open to a Head Assistant Collector to make such grants.

In this Court Mr. Raja Aiyar based his contention upon the ground that his clients acquired a prescriptive right against the plaintiffs by taking the spring water themselves through the channel to the exclusion of the plaintiffs. There has been no issue regarding this prescriptive right and we are at present unable to see how such a right could have been acquired. We have not been placed in possession of materials for arriving at a conclusion upon this point.

The next contention of the respondents' Vakil is that as his clients are in possession, the non-user by the plaintiffs disentitles them to ask for an injunction. We fail to see any force in this contention. The fact that the grant by the Government has not been availed of may enable the Government to revoke it, but so long as the grant subsists and the Government raises no objection to the intermittent use of the channel, we fail to see how the defendants who have no right either by grant or by prescription, can deny the right of the plaintiffs. The decisions in *Achanna* v. *Venkamma* (1) and *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (2) establish the proposition that as against a trespasser, a person having had enjoyment of an easement for less than the statutory period can obtain an injunction. In the present case, the position of the plaintiffs is very much stronger in that they have been continuously using the channel at least for taking flood water to their tank.

We are not able to follow the Subordinate Judge in regard to his classification of the easement claimed. We may observe that no question of easement really arises; but even granting that the right claimed is of that description, the right to take the spring water along the channel is not separable from the right to dig and take water from the bed of the river.

On the materials before us we are unable to find any right in the defendants to interfere with the plaintiff's use of the water.

We must, therefore, reverse the decrees of the Courts below and grant a decree to the plaintiffs restraining the defendants from in any way interfering with the plaintiffs in their enjoyment of the channel and of the water flowing in it. In the absence of the Government, we are not in a position to make a declaration regarding the right of the plaintiffs to the channel in question.

The defendants must pay the costs of the plaintiffs in all the Courts.

S. N./R. K.

Appeal allowed; *Suit decreed.*

(1) (1895) 5 M. L. J. 24.
(2) (1911) 34 Mad. 173=6 I.C. 266.

A. I. R. 1916 Madras 443

OLDFIELD AND TYABJI, JJ.

Narasimha Chetti and *others*—Plaintiffs—Appellants.

v.

Vijiapala Nainar and *others*—Defendants—Respondents.

Second Appeal No. 78 of 1913, decided on 24th November, 1914, against the decree of Dist. Judge, North Arcot, in Appeal Suit No. 248 of 1912.

Civil P. C. (5 of 1908), O. 21, R. 63—Scope is wider than S. 283 of old code—R. 63 covers cases of orders not passed on merits.

O. 21, R. 63, of the Code of Civil Procedure, 1908, is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation. Orders made under R. 63 of O. 21 become final if not set aside within one year. [P. 444, C. 1.]

N. S. Narasimhachari—for Appellants.

L. A. Venkataraghava Iyer for *L. A. Govindaraghava Iyer*—for Respondents.

Facts.—The plaintiffs, having on 1st December, 1905 instituted a suit against the defendants Nos. 1 to 3 on a bond executed by them in favour of plaintiffs, obtained an attachment before judgment

of the suit properties in January 1906. These properties had, however, been sold by defendants Nos. 1 to 3 to the 4th defendant on 20th December 1905. The plaintiffs' suit was decreed on 16th November 1906. In pursuance of the said decree the plaintiffs brought the suit properties to sale. On 7th January, 1909, 4th defendant put in a claim, which however was dismissed, the order being as follows: "The attachment was made in January 1906, and the sale is coming on to-day. The claim is based on a sale-deed dated a fortnight before the attachment. I find that the claim has been unnecessarily delayed and dismiss it without investigation, O. 21, R. 58 (1), proviso." The sale took place on 19th January, 1909 and the plaintiffs became the purchasers. They then sued the defendants for possession of the properties. Both the lower Courts upheld the sale to the 4th defendant. The plaintiffs thereupon appealed to the High Court.

Judgment.—The appeal is argued on the ground that the rights of the contesting defendants were disallowed by Exhibit G, the order against the 4th defendant in Civil Miscellaneous Petition No. 11 of 1909 in the District Munsif's Court, Ranipet, which has not been set aside by any decree and has, therefore, become conclusive

Contra it is argued that, as Exhibit G was not passed after investigation a suit to set it aside is not subject to the one year's limitation, and it, therefore, has not yet become conclusive. This would, no doubt, have been well-founded under Ss. 278 and 283 of Act XIV of 1882. But under the latter section it was only orders under Ss. 280, 281 and 282, which became conclusive after one year, whilst under O. 21, R. 63, the language is wider, "where a claim or objection is preferred, the party against whom an order is passed, etc.," and we cannot restrict it to cover only cases in which an investigation has taken place. In these circumstances the plaintiffs' contention must prevail.

The result is that the decrees of the lower Courts are set aside and the plaintiffs are given the decree asked for. The argument on which they have succeded here was not referred to before the District Munsif and it is not clear that it was put forward in the lower Appellate Court.

Each party will therefore, bear his own costs throughout.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 444

BENSON AND SUNDARA AIYAR, JJ.

Darbha Lingayya—Defendant—Appellant.

v.

Darbha Kanakamma—Plaintiff—Respondent.

Second Appeal No. 1845 of 1911, decided on 11th February 1913, from the decree of Tempy., Sub-Judge, Masulipatam, in Appeal Suit No. 722 of 1910.

Hindu Law—Maintenance—Widow—Right of maintenance does not depend upon inability to maintain herself—It is the right of membership in family.

The right of a Hindu widow of a co-parcener to be maintained out of the family property is an absolute right due to her membership in the family and does not depend upon her necessity arising from her want of other means to support herself. [P. 445, C. 1.]

Therefore, a widow who is able to maintain herself out of other property is not debarred from claiming maintenance out of her husband's estate. [P. 444, C. 2.]

V. Ramesam—for Appellant.

P. Nagabhusanam—for Respondent.

Judgment.—The plaintiff, a Hindu widow, instituted the suit which has given rise to this second appeal for maintenance against the defendant, her husband's brother. Both the lower Courts have found that the defendant is in possession of family property yielding about Rs. 100 a year. The plaintiff has private property out of which she could get Rs. 40 or Rs. 50 a year. The lower Courts have awarded to the plaintiff Rs. 20 a year. Mr. Ramesam for the defendant contends in second appeal that the income of the family property being small, and the plaintiff having independent means of maintenance, she is not entitled to get maintenance out of her deceased husband's estate. His argument is that a widow who is able to maintain herself out of other property has no right to claim out of her husband's estate anything for that purpose. In our opinion this view cannot be supported. It is based on an entirely

wrong conception of the right sought to be enforced. The wives of the male co-parceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husband's shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their life-time, sufficient to maintain them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves. At a partition made by the husband during his life-time between his sons his wife was, at one time, entitled to an equal share with his sons. *Mitakshara*, Chapters 1 and 2, *Slokas* 8 and 9. According to the *Dayabhaga* the husband's undivided share descends to his widow in its entirety. According to *Katyayana*, the widow may claim either a portion of the estate or an allowance for her maintenance. The same view is maintained by *Vrihaspathi*. [See G. Sirkar Sastri's Viramitrodaya, page 173.] Mr. Ramesam relies on *Ramawati Koer* v. *Manjhari Koer* (1) in support of his contention. That case no doubt is in his favour. But with all deference, we are unable to concur in the view taken there. The authorities cited in the judgment do not support the view. The passage cited from Mr. Mayne's work shows only that the private means of a widow may be taken into account in determining the quantum of maintenance to be decreed to her. The decision of the Privy Council in *Narayan Rao Rama Chandra Pant* v. *Ramabai* (2) has really no bearing on the point. Mr. Sirkar Sastri's view in his book on Hindu Law is not to the effect that the right to maintenance can be extinguished by the possession of other property by the widow. We must hold that the plaintiff is entitled to some maintenance out of her husband's estate. We cannot say that the amount awarded is excessive.

We dismiss the second appeal with costs.

S. N./R. K.

Appeal dismissed.

(1) (1906) 4 C. L. J. 74.
(2) (1878-79) 3 Bom. 415; 6 I. A. 114.

A. I. R. 1916 Madras 445

SPENCER AND COUTTS-TROTTER, JJ.

Kuttiyali Vadakkedath Kunhan Moothad—Plaintiff—Appellant.

v.

M. R. Ry. A. R. Banerji Avergal and *others*—Defendants—Respondents.

Second Appeal No. 2581 of 1912, decided on 23rd July, 1915, from the decree of Dist., Judge, South Malabar, in Appeal Suit No. 78 of 1912.

(a) Provincial Small Cause Courts Act (9 of 1887), Art. 13—Suit by purveyor of temple for dues of office is not tenable in small cause.

Where the plaintiff, a purveyor of a temple, sues for dues accruing to him by reason of his hereditary office and not for the value of goods received by the temple, the suit is not cognisable by a Small Cause Court. [P. 445, C. 2.]

(b) Civil P. C. (5 of 1908), S. 86—Ruling Chief whether as principal or pro forma defendant—Consent is necessary.

A Ruling Chief cannot be sued in a competent Court without the consent of the Governor-General in-Council obtained under S. 86, Civil Procedure Code, whether he is a principal party or only a *pro forma* defendant in a case, inasmuch as the section makes no distinction between cases in which personal relief against a Ruling Chief is sought and others. [P. 446, C. 1.]

Where the Raja of Cochin was sued as the Cochin Sircar represented by the Dewan of Cochin.

Held, that the suit being virtually against the Raja was forbidden by S. 86 of the Civil Procedure Code. [P. 446, C. 1 & 2.]

K. P. M. Menon—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Spencer, J.—An objection has been taken that this second appeal will not lie, as the suit is of a Small Cause nature.

It is, however, clear from the plaint that the cause of action was not the value of the goods received by the temple, but the dues accruing to the plaintiff by reason of his hereditary office as purveyor of *ghee* for a fixed annual allowance (see Article 13 of the second Schedule, Provincial Small Cause Courts Act).

Mr. Menon has raised three points, *viz.*, that the suit as framed will lie without permission being obtained under S. 86 of the Code of Civil Procedure.

1. Because the suit is not to obtain any personal relief against the Raja of Cochin or against his State.

2. Because the first defendant is really the Dewan of the Cochin State and not the Raja

3. Because the suit is against the temple trust, which is an aggregate Corporation and because any one of the trustees has, he argues, no separate and independent existence.

The first point was considered and decided by Tyabji, J., in *Kuthaldath Narayan Mootha* v. *Cochin Sircar* (1), in which the defendant was described in a similar manner to the description in this suit *viz.*, the Cochin Sircar represented by the Dewan of Cochin. I agree with what the learned Judge observed on this point, and I would add that this section makes no distinction between cases in which personal relief is asked for and others. In every suit whether a particular defendant is a *pro forma* defendant or a principal party, the Court must be taken to have the power to order his appearance in person under O. 5, R 3, or to direct him to pay costs and otherwise subject him to the jurisdiction of the Court by making him obey its directions.

The second point has not been raised either in the lower Appellate Court or in the second appeal memorandum and having regard to paragraph 2 of the plaint and to paragraph 1 of the District Munsif's judgment, it is clear that the plaintiff's case till now has been that the trusteeship was vested in the Raja rather than in his Dewan and that in mentioning the Dewan and describing him as representative of the Cochin Sircar, the plaintiff was merely complying with the provisions of S. 87 of the Code of Civil Procedure.

The third point does not arise in this suit, which is ostensibly against the trustees for what they have done or rather left undone.

The second appeal fails and is dismissed with costs.

Coutts-Trotter, J I am of the same opinion. When the pleadings are properly translated, it is apparent that the Cochin Sircar is the first defendant, and a reference to S. 87 of the Civil Procedure Code shows that this is tantamount to suing the Raja which is forbidden by S. 86, see *Gilmore* v. *State of Travancore* (2).

The suggestion that S. 86 does not apply where the Prince or Ruler is sued only in a representative character as a trustee is to my mind unarguable.

I express no opinion as to whether the objection to the jurisdiction is or is not good, as, in my opinion, the appeal fails on the merits in any event.

S.N./R.K.

Appeal dismissed.

(1) (1913) 21 I. C. 930.

(2) (1912) 17 I.C. 444.

A. I. R. 1916 Madras 446

OLDFIELD AND TYABJI, JJ.

Ottapurakkal Thazath Suppi and *others*—Petitioners—Appellants.

v.

Alabi Mashur Koyanna Koya Kunhi Koya—Respondent.

Letters Patent Appeal No. 100 of 1913, decided on 21st October, 1914, against the Judgment and order of Miller, J., in Civil Rev. Pet. No. 772 of 1912, reported in A. I. R. 1914 Mad. 141.

Civil P. C. (5 of 1908), O. 39, R. 2 (3) and O. 43, R. (1) (2) —Appellate Court can order imprisonment for disobedience of injunction (Per Oldfield, J.) disobedience of injunction being separate from suit calls for separate punishment—(Per Tyabji, J., dissenting) order of imprisonment cannot be passed in appeal.

An order refusing to attach property for disobedience of an injunction order is an order passed under O. 39, R. 2 (3). and is appealable under O. 43, R. 1 (*r*), and the Appellate Court has jurisdiction to pass an order of imprisonment in appeal. [P. 447, C. 1 & 2.]

Per *Oldfield, J.*—Disobedience of an injunction order is an act independent of the suit and the injunction and calls, therefore, for a separate punishment. 10 Mad. 179; 35 All. 425 and 19 Bom. 152, Dist. *Seaward* v. *Paterson*, (1897) 1 Ch. D. 545 and 1892 W. N. 22 Foll. [P. 447, C. 2.]

Per *Tyabji, J.* (dissenting)—O. 43, R. 1 (*r*) is not sufficient to give to the Appellate Court the power which is restricted "to the Court granting the injunction," in other words no appeal is intended to be given as regards the exercise of a power which is annexed to a specified Court. [P. 448, C. 2.]

A. I. R. 1914 Cal. 815 and A. I. R. 1915 Cal. 283 Foll.

J. L. Rozario—for Appellants.

A. Sundaram and *A. Rangaswami* - for Respondent.

Oldfield, J.—The District Munsif granted a temporary injunction, and the appellants as they eventually admitted, disobeyed it. Whilst the suit was still pending and the injunction was still in force, the District Munsif was moved to deal with their disobedience ; but at the request of the parties he adjourned the petition with the suit, until the latter had been disposed of, when on the 30th September 1911 he dismissed it on the ground that, whether or no disobedience had taken place, the case was not one for punishment. On appeal the District Judge remanded it for re-admission and disposal. The District Munsif then considered it sufficient to express his grave disapproval and order the appellants to pay the respondent's costs. The District Judge, in the order which this Court was asked to revise, imprisoned the appellants for one month. This Letters Patent Appeal is against the refusal of a Judge of this Court to interfere in revision.

It is argued first that no appeal lay to the District Judge because O. 43, R. 1 (*r*), provides for an appeal only against an order under O. 39, R. 2, and the decision of the District Munsif was a refusal to pass such an order. No authority has been adduced for this contention, and it is negatived by *Venkatasami* v. *Stridavamma* (1) and *Lachmi Narain* alias *Munnuji* v. *Ram Charan Das* (2). It, therefore, cannot be accepted.

It is said next that the District Judge had no power to pass an order of imprisonment in appeal, because under S. 104 (2), Civil Procedure Code, no order passed by him in appeal is appealable and it is inconceivable, especially in view of S. 104 (1), (*h*) that any order directing imprisonment should be final. But all such orders are subject to control by revision ; and, even if the competence of Appellate Courts to use their power with discretion were doubtful, no apprehensions would justify a refusal on our part to give effect to the provisions of the Code as they stand.

Another objection to the District Judge's order is that O. 39, R. 2, confers the power to imprison or attach property for breach of an injunction only on the Court granting it, not on the Appellate Court, and that, therefore, the District Munsif alone could take action. In connection with this and other parts of the appellants' arguments it is, no doubt, material that the application of a *quasi*-penal provision is in question and that such a provision must be construed strictly; and, no doubt, the wording of the Order affords support to this objection. *Contra* reliance has been placed on S. 107 ; and, when it has been held that an appeal lies against an order refusing to deal with disobedience, it follows that the power to deal with it by imprisonment or attachment is available to the Appellate Court. The reference to " the Court granting the injunction " was first made in the present Code ; and, if its introduction needs explanation, one may be found, not in the advisability of restricting the use of these powers to the Court of first instance, but in the necessity for guidance in cases in which it might be doubtful which Court of first instance should use them, as for instance in suits covered by S. 19 or 20, since an injunction issued in such a suit is liable to infringement outside the jurisdiction of the Court which granted it.

The appellants contend next that on the date of the District Judge's order no Court was competent to use the powers conferred by O. 39, R. 2 (3), because those powers could not be used then to secure obedience to the injunction, which had been vacated on the disposal of the suit and could, in no circumstances be used to punish for past disobedience. It must be conceded that unless a punitive, and not merely a coercive, use of the Court's powers is legitimate, the order cannot stand. But it has not been shown that only the latter is contemplated. It may be that the Court should require much clearer and stronger reason when it is asked to punish a past infringement, and not also to prevent one in the future. It does not follow that it can use its powers only for the latter purpose. There is no authority cited for that view ; and there is some against it. *Advocate-General of Bombay* v. *Ganji Akhai* (3) was decided on the original side with reference either to general principles or to S. 493

(1) (1887) 10 Mad. 179.
(2) (1913) 35 All. 425 ; 20 I. C. 653.
(3) (1895) 19 Bom. 152.

of the Code of 1882, in which the enforcing of the injunction is explicitly referred to. Yet in the judgment the Court's right to inflict punishment for a completed act of disobedience as well as to enforce compliance with its order for the future is recognised. *Vide* also *Seward* v. *Paterson* (4) and *In re A Solicitor* (5). It is argued that the punitive exercise of the Court's powers is excluded by implication, because under O. 39, R. 2 (4), attached property cannot be sold and its contumacious owner cannot be damnified, unless and until disobedience has continued for one year, and this postulates that at the date of the sale the injunction is still in force. But the argument takes no account of the facts that (1) imprisonment can be awarded without reference to disobedience continuing, (2) there is no provision for the termination of the imprisonment or attachment (before one year has elapsed), in case either the disobedience or injunction ceases, (3) attachment at least in the case of movables is itself punitive, whether or no it ends in sale. The order, therefore, cannot be held objectionable on this ground.

Lastly it is urged that the reference in O. 37, R. 2 (3), to the Court's power to order attachment of property "and also" imprisonment entails that the latter power shall be exercised only after the former and that, no attachment having been ordered in the present case, the order for imprisonment is illegal. The interpretation adopted by the learned Judge is a reasonable one, that this wording merely permits the exercise of the two powers in the alternative. This would be consistent with the wording of the former Code and with the fact that in S. 94 these powers are specified in the reverse order. Moreover, no reason apart from this wording has been suggested for the assumption that one power must be exercised before the other.

Objections to the order on legal grounds thus fail. On the merits there is no valid reason for dissent from the conclusion of the learned Judge, that the order has not been shown to work injustice of any kind, or from his refusal to interfere in revision. I would dismiss the Letters Patent Appeal with costs.

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(4) (1897) 1 Ch. D. 545=66 L. J. Ch. 267.
(5) (1892) W. N. 22.

Tyabji, J.—O. 39 R. 2, (3), provides that "the Court granting an injunction" may order the property of a person guilty of disobeying the injunction to be attached, "and may also order such person to be detained in the civil prison." The question is whether by reason of an appeal lying from orders passed under the said rule the Appellate Court is empowered to pass the order which the Court granting the injunction is thus expressly empowered to pass [See O. 43, R. (1) (*r*)].

Appellate Courts have the same powers as the Courts of original jurisdiction,—Civil Procedure Code, S. 107 (2)—and it is argued that consequently the fact that an appeal lies from the order for attachment or imprisonment implies that the Appellate Court has the same powers to order imprisonment as the original Court. But this argument, it seems to me, overlooks the real difficulty. It may be inverted into the contention that inasmuch as the Appellate Court would have the power of imprisonment if an appeal lay and inasmuch as the Legislature has restricted the power of imprisonment expressly to the Court granting an injunction, it follows that no appeal should lie.

The real question seems to be whether (*a*) the fact that an appeal lies or (*b*) the insertion of the restricting words, "the Court granting the injunction," is to be considered as laying down the governing consideration. Not without hesitation I am of opinion that O. 43, R. (1) (*r*), is not sufficient to give to the Appellate Court the power which is restricted to the Court granting the injunction, in other words that no appeal was intended to be given as regards the exercise of a power which is annexed to a specified Court.

My reasons for coming to this conclusion are :—

First, the words qualifying "the Court," —"granting the injunction"—are used in marked distinction to the absence of such words elsewhere in O. 39, R. 2. Even in the same sub-rule the word "Court" is later on used in an unqualified manner: release may be directed by "the Court," not "the said Court." It is argued that the qualifying words were intended to prevent the powers being

used by a Court to which the jurisdiction was transferred, *Sheik Jaharuddin* v. *Hari Charan Poddar* (6). Granting that that is so, it does not follow that there was no other restriction; perhaps the contrary.

Secondly, I am not unaffected by the terms of S. 104 (1) (*h*) and (*i*), which show (1) that an order imposing a fine or directing an arrest is ordinarily appealable, but (*ii*) not an order refusing to impose a fine or to direct an arrest, (*iii*) that an appeal from an order not falling without clauses (*a*) to (*h*) can only lie if an appeal is "expressly" provided by the body of the Code or "expressly" allowed by the rules: thus implying that if an order not falling within these clauses is to be appealable for some special reason not within the general principles laid down, some express enactment is contemplated; and this somewhat strengthens my disinclination to consider the words "(Court) granting the injunction" as being made nugatory by the general right of appeal, (*iv*) clause (*h*) makes every order imposing a fine or directing arrest appealable: if the Appellate Court has the power to impose a fine or direct arrest, though the Court of first instance refused to do so, then by operation of S. 104 (2) the Appellate Court's order will not be subject to appeal: thus the general principles contained in S. 104 (1) would be violated, not only as stated in (*iii*) above, but because an order for arrest will then be entitled to stand though it has not the security of two concurrent decisions upholding it, which is what the principle of the section seems to require by implication. No doubt the revisional powers of this Court may be invoked, but they would not ordinarily entitle the question of facts to be revised.

Thirdly, the right to appeal from an order granting an application for revision [O. 43, R. (1) (*w*)] has been held to be restricted to the grounds referred to in O. 47, R. 7, see *Hari Charan Saha* v. *Baran Khan* (7). Civil Miscellaneous Appeal No. 195 of 1910, though the clause granting the review is unrestricted in its terms. In my opinion in regard to this last matter the two rules in question permitted of being reconciled, but I feel bound by authority to hold otherwise. See *Aiyarappa Mudaliar* v. *Gulam Ghouse* (8). It seems to me that the reasons in the present connection are at least as strong for holding that it was not intended to entitle the Appellate Court to exercise the powers which are granted specially to the Court granting the injunction.

Mr. Rozario urged another ground based on the construction of the words "may also" in O. 39. R. 2 (3). I agree in Mr. Justice Miller's construction of these words, *i. e.*, that it is meant that the Court shall also have the power to commit, and not that the power to commit is not to be used without ordinary attachment.

For the reasons I have given it seems to me, with great deference, that the District Judge had no jurisdiction to order the detention of the appellants. But as my learned brother is of opinion that the order appealed from should stand, the appeal will be dismissed under clause 36 of the Letters Patent of the High Court.

By the Court.—Under clause 36 of the Letters Patent the appeal is dismissed with costs.

S. N./R. K.

Appeal dismissed.

(6) A. I R. 1914 Cal. 815=22 I. C. 499.
(7) A. I. R. 1915 Cal. 283=41 Cal. 746=25 I. C. 903.
(8) (1913) 26 I. C. 831.

A. I. R. 1916 Madras 449

SADASIVA AIYAR AND NAPIER, JJ.

South Indian Export Co., Ltd.—Appellant.

v.

T. Subbier and *others*—Respondents.

Original Side Appeals Nos. 63 and 71 of 1914, decided on 26th February, 1915 from the decree of Wallis, C. J., dated 2nd March, 1914, in Civil Suit No. 90 of 1912.

(a) Hindu Law—Where reversioner is party to fraud in minor widow's alienation represented as major he will be estopped from setting it aside.

Where a reversioner himself was a consenting party to a fraud, put forward a minor as a major and on the faith of such representation, induced third parties to enter into a transaction, it is not open to him afterwards to impugn the transaction as invalid and avoid it on the ground that the widow was a minor on the date of the transaction. 20 Cal. 296 (P. C.); A. I. R. 1914 P. C. 90; A. I. R. 1914 P. C. 128, Foll.

[P. 452, C. 2.]

(b) Hindu Law—Widow—Widow inheriting family business can conduct and manage it as any other property.

Per *Sadasiva Aiyar, J.*—A trade and its good-will are valuable property and when they are inherited by a widow, she has power to manage that particular business as heir in the same manner as she has authority to manage a *zemindari* estate inherited by her from her husband. 17 I. C. 609 and 26 Bom 206, Ref to. [P. 450, C. 2.]

(c) Hindu Law—Debts—Necessity.

Debts incurred on re-drafts to carry on a family business are debts of necessity binding on a reversioner. 17 I. C. 609, Foll. [P. 451, C. 1.]

(d) Hindu Law Alienation—Necessity—Consent—Reversioner's consent is conclusive evidence of necessity.

Consent by a reversioner to an alienation made by a Hindu widow, by itself makes the transaction valid, and is not merely presumptive and rebuttable evidence of necessity. 26 I. C. 757; 30 All. 1 (P.C.); A.I.R. 1914 P C. 90; 31 Mad. 366; 8 M.I.A. 529 (P. C.) Ref. to. [P. 452, C. 1.]

D. Chamier, Pandalai, Short and *Bewes & Co.* and *C. P. Ramaswamy Aiyar*—for Appellants.

A. Doraisamy Aiyar and *N. Grant* - for Respondents.

Sadasiva Aiyar, J.—I have had the great advantage of a perusal of the judgment just now delivered by my learned brother and though I agree practically throughout both in his conclusions and reasons, I think it not inappropriate to say a few words on one or two questions of law which were elaborately argued on both sides.

On the question whether a Hindu widow is entitled to carry on the trade business which she inherited from her husband, their Lordships of the Privy Council have made the following observations in the case of *Amarnath Sah* v. *Achan Kuar* (1): "On this point" (that is, the point whether the deceased Khairati's widow and heir was under a necessity to borrow money in order to ward off total insolvency) "their Lordships agree with the High Court in thinking the effect of Hira Lal's evidence to be that at Khairati's death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business, before venturing to endorse the opinion of the High Court." A trade and its good-will are valuable property and when they are inherited by a widow, I do not see why she should not manage that particular business as heir in the same manner as she has authority to manage, say, a *zemindari* estate which she might have inherited from her husband. In the present case, the deceased Krishna Aiyar and his elder brother, Narayana Aiyar, carried on a large skin trade as if it was their family business, though it does not appear that it was an ancestral business. It was really a business which Pattammal's husband adopted as his occupation in life. I am not aware of any law which obliges a widow inheriting her husband's trade business to wind up the business as soon as her husband dies. Hindu ladies in the south of India are not generally *ghosha* or *pardanashin*. A large proportion of Brahmin ladies are literate in the vernacular and their average business ability is not appreciably, if it all, inferior to that of the average male Hindu. The facts in this present case seem to me clearly to show that the condition in which the deceased Krishna Aiyar had left his business and his affairs at the time of his death in March 1909 was such that everybody connected with that business, or in a position to give valuable opinion as to the necessity or otherwise of carrying on that business, was strongly and unhesitatingly of the view that unless the business was carried on by the widow, it was impossible to save anything out of it for her as the heir or for the contingent reversioner, the 1st defendant. The debts then amounted to about Rs. 1,60,000 and the estate, if realised without forced sales, was worth about Rs. 1,40,000 (say, just sufficient to clear the debts.) This is clearly established by the evidence of the plaintiff's 3rd witness, Swaminatha Aiyar. The business was no doubt subject to fluctuations, but there is nothing to show that at Pattammal's death the estate had drifted into a worse position than the position border-

(1) (1892) 14 All. 420; 19 I. A. 196=6 Sar. 197 (P. C.).

ing between bare solvency and insolvency in which it was left by her husband, Mr. Krishna Aiyar. The mere fact that the indebtedness to the plaintiffs (one only of the numerous creditors) was about Rs. 15,000 at Krishna Aiyar's death and was Rs. 25,000 at Pattammal's death affords no criterion by which the relative positions of the estate on the two dates could be safely judged, as we do not know how far the debts to other creditors which amounted to nearly a lakh of rupees at Krishna Aiyar's death had been paid off or added to during Pattammal's life-time. I further respectfully agree with the trial Judge for the reasons stated by him that a Hindu widow is entitled to carry on the business left by her husband under certain stated circumstances, and the circumstances of this case show that it was a proper thing for Pattammal to have so carried on her husband's business. As the very nature of the business requires borrowings for capital and owing to fluctuations in price results in the case of some of the transactions in the incurring of debts on re-drafts, the incurring of such business liabilities by the widow ought to be treated as debts of necessity binding on the reversioner. When the touchstone of necessity is satisfied, the question whether the managing male member of a Hindu family carrying on a business has greater powers of charging the property in certain cases than a widow who succeeds to her husband's business, becomes a rather academical question. That the word "necessity" should be given a liberal interpretation even when a guardian acts on behalf of a minor has been decided in *Vembu Iyer* v. *Srinivasa Iyengar* (2), and a Hindu widow who is the sole owner of her husband's estate (though a qualified owner) cannot have a more restricted authority than the guardian of a minor owner, the guardian having no right at all in the property.

On my above view of the facts and the law it is perhaps unnecessary in this case to consider the other question elaborately argued in this case, namely, whether the next reversioner's consent to and concurrence in the widow's carrying on the trade and incurring the liabilities in the ordinary course of carrying on the trade prevent him, when he succeeds as reversioner at the widow's death, from questioning the validity of the debt. As, however, the question was strenuously argued I shall state my views very briefly. The case-law on this point is rather concerned with alienations by way of sale or mortgage made by the widow and consented to and concurred in by the next reversioner than with the incurring of debts with his consent. I think that the principle underlying the bar in one case must apply in the other case also. In the present suit the 1st defendant did give his consent not only to the incurring of debts, but also to the creation of the charge for these debts on the plaint properties except the Sembium tannery purchased by Pattammal after the date of Exhibit F.

The conflict of views as to the legal basis on which the consenting reversioner is held bound has been very acute. In the recent Full Bench case *Nachiappa Gounden* v. *Rangasami Gounden* (3), decided by the learned Chief Justice, Seshagiri Iyer and Kumaraswami Sastri, JJ., it cannot be said that any views common to all the members of the Full Bench have been formulated which are binding on a Division Bench. On the question of the effect of the consent and concurrence of the next reversioner, it is, no doubt, true that the view taken by me in two cases (namely, that it is conclusive as to the validity of the widow's acts done with such consent and concurrence) is not accepted by my learned brothers Seshagiri Iyer, J., and Kumaraswami Sastri, J., the majority of the Full Bench. Seshagiri Iyer, J., says that the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4) is *not* an authority for the contention that the assent of the reversioner is anything more than presumptive evidence of justifiable alienation. Kumaraswami Sastri, J., says: "The effect of the decisions of the Privy Council no doubt gives to the assent a high evidentiary value, but they do not make it conclusive proof." I need not say that out of the great respect which I naturally have for the opinions of my two learned brothers I would have hesitated to act upon the different opinion which (following the learned Chief Justice) I have long held on this question, if it were not for the latest pronouncement of their Lordships of the Privy Council which is found in *Hari*

(2) (1912) 17 I. C. 609.

(3) (1915) 26 I. C. 757.
(4) (1908) 30 All. 1=35 I. A. 1 (P. C.).

Kishen Bhagat v. *Kashi Pershad Singh* (5). This decision of their Lordships is dated 2nd December, 1914 after the opinions of my learned brothers in the above case, namely, *Nachiappa Gounden* v. *Rangasami Gounden* (3), had been pronounced on the 20th November, 1914. Their Lordships of the Privy Council treat the consent of the next reversioner not merely as presumptive evidence of the necessity for the alienation made by the widow, but as a "stringent equity" which "fulfils the requiremnts" of the law as to proof of necessity. I shall just quote the very words of their Lordships: "The requirement of the law" (as to establishing necessity) "may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in transactions." The phrase "stringent equity" (which can be enforced against the consenting reversioner) is taken by their Lordships from the words used by Lord Hobhouse in *Jiwan Singh* v. *Misri Lal* (6), during the course of the argument of the Counsel in that case. I think I am bound by the opinion of their Lordships that the consent and concurrence of the reversioner is not only presumptive evidence but it is further a "stringent equity" binding on the reversioners, so as to prevent them from contending that necessity has not been sufficiently proved and, therefore, that the transaction is not valid. In this connection I might be permitted to state that the same view of the Privy Council decisions as to the effect to be given to the consent of the reversioner seems to have been taken by Sankaran Nair, J., in the case in *Rangappa Naik* v. *Kamti Naik* (7). The learned Judge referring to the *dictum* of their Lordships of the Privy Council in *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (8), says: "On the other hand, an alienation *which would not otherwise be legitimate* may become so if made with the consent of the husband's kindred; or in other words, an alienation not for necessity may be valid in certain cases, if made with the consent of the husband's kindred. The consent by itself makes the alienation, not otherwise legitimate, valid." It is very difficult, therefore, in my opinion, to hold that the consent is only presumptive and rebuttable evidence of necessity, and not a thing which creates an equity against the reversioner even if necessity is negatived.

In the present case, not only did the 1st defendant who was the sole presumptive reversioner (and who became the sole actual reversioner on the death of the widow) consent to the incurring of the debts and the giving of the properties by the widow as security to the plaintiff (Company), but he it was that took an active part in the negotiations and induced the plaintiff Company to help Pattammal to carry on the business. The facts proved in this case as showing the 1st defendant's consent and concurrence were almost the identical facts which have been proved in a similar suit brought by another creditor of Pattammal and the appeal (Appeal No. 76 of 1913), therefrom, was decided by Sankaran Nair and Spencer, JJ. The same facts were also alleged in that case as regards the representation by conduct made by the 1st defendant in respect of Pattammal being a major (the present 1st defendant was the 7th defendant in that other suit). I might further add that the plaintiff in that suit has been examined as P. W. No. 2 in the present case. The learned Judges, Sankaran Nair and Spencer, JJ., in their judgment in the above appeal state as follows: "The plaintiff swears that the 7th defendant and certain other defendants begged him hard after Krishna Aiyar's death to lend money to the widow. He says they (the present 1st defendant and others) told him that the creditors of Krishna Aiyar were threatning to attach Krishna Aiyar's properties and that they would suffer great loss if he did not help." The learned Judges further state that as the 1st defendant led the plaintiff to believe that money could be safely advanced directly to Pattammal, such representation involves also the representation that Pattammal was not a minor and that there was very little doubt that the 1st defendant must have represented to the world that Pattammal was of an age competent to enter into contracts with others, especially by his having himself taken a power-of-attorney and a sale-deed from her and by having made her execute other bonds as a major. The learned Judges further say that it would not be open to the 1st defendant afterwards to say that Pattammal was not a minor. As on the same facts and almost the same evidence those learned Judges

(5) A. I. R. 1914 P. C. 90=42 Cal. 876=42 I. A. 64=27 I.C 674 (P. C.).
(6) (1896) 18 All. 146=23 I. A. 1 (P. C.).
(7) (1908) 31 Mad. 366.
(8) (1859-61) 8 M. I. A. 529=9 W.R. 61 (P.C.).

have held that the 1st defendant had estopped himself, against the creditors who lent only to Pattammal to carry on her business, to deny that the loans from those others were required to discharge the debts of Krishna Aiyar or to deny that Pattammal was a major, that decision and the question of estoppel seems to be a decision on a question of law and I am prepared to follow it.

In the result the Appeal No. 71 will be dismissed with plaintiff's costs. Appeal No. 63 was not pressed and will also be dismissed with costs.

Napier, J.—These are two appeals from the judgment of the Chief Justice (then Mr. Justice Wallis) in Civil Suit No. 90 of 1912. The plaintiffs were the South Indian Export Company, who sought to have a charge declared on certain properties specified in the schedules to the plaint with consequential reliefs. The properties had been mortgaged by deposit of title-deeds by one Pattammal, the widow and heir of one T. Krishna Aiyar. The defendants Nos. 1 to 8 and Nos. 10 to 12 were persons claiming, or thought entitled to, interests in the properties, while the 9th defendant was a mortgagee of the properties from one of the reversioners, the 1st defendant, who has since heen found to be the reversioner entitled. The principal appellants before us are the 1st defendant and Messrs. Shaw Wallace and Co., the 9th defendant. The learned Judge has found that the widow was in fact a minor at the time of the alienations but that the 1st defendant was estopped from setting up that defence. He also found that, if she was a major, she would have been justified in carrying on the business of tanning, it having been her husband's business. The appellants contend that as a minor and a Hindu widow she could not carry on the trade and alienate the properties. They argue that the advances were not made on the representation of the 1st defendant, even if he did represents the widow to be a major, which they also deny. They further contend that even if the 1st defendant is estopped with reference to the period of two months during which he held a power-of-attorney from the widow to manage the business, the plaintiff Company were put on notice by the proceedings which he took within six months to oppose the widow's application for succession certificate on the ground of her minority. Another contention is that even if she was entitled to carry on the trade, she was not entitled to extend it, and that loss having occurred through the extension of business the property in the hands of the 1st defendant is not liable.

We have examined the evidence as to her age minutely, and agreeing with the learned Judge, are satisfied that she was a minor. Mr. Grant for the respondents objected to two letters and an entry in an account which have been used as evidence of minority; but even if these were excluded, there remains enough evidence to make the matter clear from doubt. Indeed Mr. Grant did not press his appeal which raised this point.

The important question then arises as to whether the 1st defendant was in fact aware of her minority at the time of the agreement, Exhibit F. I do not think it necessary to refer to the evidence in detail. It has all been read to us and commented on; but I am satisfied that not only the 1st defendant but her father and the working partners of her late husband were perfectly well aware of her minority and conspired to keep their knowledge of that fact from the plaintiff's agent, Ramanjulu Naidu, when he went down to Trichinopoly on the death of T. Krishna Aiyar in March 1909 to see what arrangements could be made with reference to the deceased's business. The truth comes out in the evidence of D. W. No. 2, one Sadasiva Aiyar. This man is a broker in the employment of the 9th defendant, the holder of the mortgage from the 1st defendant. He was employed by T. Krishna Aiyar, the husband of the widow, and before him by T. Narayana Aiyar, his brother who started the business. He knew the whole business and he knew the family intimately. He proves the minority of the widow and states that he knew all along that she was a minor. He was asked: "Why did you choose to keep secret the question of Pattammal's minority? His answer was: "When all the principal people were keeping it secret, why should I publish it? This was undoubtedly the truth; and he was equally undoubtedly a party to the conspiracy. He endeavours to sheild the 1st defendant by pretending that he does not know whether Viswanatha Aiyar was aware of the fact. This is obviously false, and the statement is made in the interests of Messrs. Shaw Wallace and Company, so as to protect the mortgage

given to them by the 1st defendant. Much light is thrown on the conduct of the parties by Exhibit S, a letter written on the 29th of March 1909 by the Company's agent, Ramanjulu, to his principals. After the first defendant and Ponnuswamy Pillai, one of the former working partners, had taken a power-of-attorney from the widow to carry on the business, the agent writes: "The power-of-attorney is delayed in registering owing to the age question of Krishnier's widow. Doctor's certificate is required to satisfy the Registrar and it will be done to-morrow."

There is no suggestion here that there was any doubt in the minds of any of them whether she was a minor or not. They could not help the fact of the difficulty coming to the knowledge of the agent, but they obviously told him that the Registrar's objections were unfounded and that the matter would be put right at once. They did in fact procure the certificate from a doctor of the name of Mr. McCaully who was deceived by the lady's appearance, as it appears that she was an unusually well grown woman for her age.

It is urged by the appellants that the plaintiffs relied on this representation by the Registrar. But this contention cannot be accepted. The procuring of the certificate to satisfy the Registrar was in fact the last stage in the conspiracy.

Mr. Chamier has addressed a long argument to us to establish that it was not the 1st defendant who put forward the lady as a major originally but Ramu Aiyar, her father, and Swaminatha Aiyar, the deceased Krishna Aiyar's son-in-law and one of the working partners. This argument is based on the letters written by the agent to his principals at the time of the negotiations. Those letters, it is true, lend some support to that contention. But when the oral evidence is examined it is perfectly clear that Viswanatha Aiyar, the 1st defendant, took part in the negotiations. P. W. No. 2 a merchant dealing with the deceased Krishna Aiyer, proves conclusively that the 1st defendant was at that time endeavouring to get help from others and to pacify creditors on the ground that Pattammal was going to carry on the business. It is impossible to suppose that, when it was arranged on the 22nd March that the 1st defendant should hold the power-of-attorney with Ponnusawmi Pillai, he had not been a party to the prior negotiations. Bearing in mind that he claimed to be the adopted son of Narayana Aiyar, which claim had been admitted by Krishna Aiyar in 1903 (*Vide* Exhibits B and C), it is perfectly clear that he was of all persons the most anxious that the business should be carried on, so that in the event of anything happening to the widow the business would come to him. His own letter to the Company, Exhibit JJ, written on the 28th March 1909, practically puts him out of Court. The words are: "With regard to the business of my uncle, late Mr. T. Krishna Aiyar, I beg to state that myself and Mr. Ponnusawmi Pillai have the power-of-attorney from Mrs. Krishnier...In conclusion I beg to state that you will render me your help in the affair of Mr. Krishnier, since his business has been a long standing one which I do not like to give up." On a review of the whole evidence I am satisfied that from the first he was perfectly well aware of the fact that the lady was a minor, that he deceived the Company's agent and that his action was guided by what he thought to be his own interest in the matter. After the registration of the power-of-attorney arrangements were perfected for carrying on the business and were embodied in an agreement, Exhibit F, of the 17th of May, 1909 of which, of course, the 1st defendant holding the power-of-attorney was fully cognizant. I shall have to refer to this letter, Exhibit JJ, on other point.

The next stage was the cancellation by the widow of her power-of-attorney to the 1st defendant. This was on the 2nd of June, 1909 (Exhibit XVI). After this date Ponnusawmi Pillai alone acted as her agent. We now come to the proceedings to obtain the succession certificate, on which the appellants rely as putting an end to the representation if there was any. It appears that on the 15th October, 1909, Pattammal applied for a succession certificate, and the 1st defendant put in a counter-petition (Exhibit HH), alleging that she was a minor. Judgment was given by Mr. Pinhey, the District Judge, on the 7th of March, 1910 rejecting the application on the ground of her minority. The plaintiffs' Solicitors have made an admission in this suit that they were aware of those proceedings (*Vide* Exhibit VII). The admission is that "in or shortly after the latter part of October 1909 our clients knew that there were proceedings pending between Pattam-

mal and Viswanatha Aiyar in which he raised the question as to her age and alleged that she was a minor." It further appears that the plaintiffs produced before that Court the agreement of the 17th of May, 1909 made between them and Pattammal.

The notice is, therefore, clear, but it is to be observed that there is no admission that the plaintiffs knew of the judgment in the case and, what is most important, it is clear that the 1st defendant did not himself notify the plaintiffs of either the proceedings or the result. The learned trial Judge has taken the view that "the fact that the nearest reversioner asserted that the widow was a minor was of no probative value whatever," the plaintiff Company having no means of knowing whether she was a minor or not. And it is of importance that in proceedings taken as late as 1913 the Subordinate Judge of Trichinopoly found that she was a major. I can only attribute the failure of the 1st defendant to inform the Company to one motive, namely, that he did not wish the business to be stopped, but desired to be in a position to do exactly what he has done, namely, to allow the business to go on in the hope that it would be remunerative but in the event of the early death of the widow, to be in a position to challenge the alienations.

The question now arises, what is the effect of this notice? Mr. Chamier contends that it is not constructive notice from outside, but a direct notice from the 1st defendant to the Company. I cannot accept this contention. The learned trial Judge has held that as the 1st defendant was not in a position to make *restitutio in integrum* he cannot claim that the notice operated to terminate the representation. Mr. Grant has invited our attention to a number of cases on this point, and relies on passages in Spencer Bower on Actionable Misrepresentation. The proposition is stated on page 202: "Moreover actual and personal knowledge must be proved. Constructive or imputed notice is entirely out of the question. There is absolutely no exception to this rule. Thus it is of no avail to show merely that the representee had the means of knowledge within his reach." The knowledge must be clearly proved to have been full and complete. Partial and fragmentary information or mere suspicion will not do. The case of *Frederick Bloomenthal* v. *James Ford* (9) is an authority very much in point. There the appellant lent money to a limited Company upon the terms that he should have as collateral security fully paid up shares. The Company handed certificates for 10,000 shares to the appellant, the certificates stating that they were fully paid-up. The Company having gone into liquidation, the appellant was placed on the list of contributories. It was held that since the Company had obtained the loan by a representation that the shares were fully paid up, which the appellant believed and acted upon, the Company and the Liquidator were estopped from alleging that the shares were not fully paid-up. The Lord Chancellor deals with the argument put forward in these words: "You should have inquired. You should have observed certain circumstances; and if you had done that...you would have known that 'fully paid-up shares' did not mean what on their face they purported to mean," and declines to accept this as a defence. On page 165 his Lordship uses these words. "The evidence of the appellant goes uncontradicted that he did not know, and had no reason to know, that the representation made to him was not perfectly true." It is to be noted that the word used is "know" and it seems clear that in his Lordship's view circumstances raising a doubt as to the truth of the representation are not sufficient. Lord Herschell's judgment is also to the same effect; and the other learned Lords agree. It cannot, I think, make any difference that the representation was made not by the person who originally took the benefit. In this case the Liquidator was held bound, and it was put on the ground of estoppel. This is exactly the position here. The representation was made by the 1st defendant and it is he who is estopped by it. In *Redgrave* v. *Hurd* (10) Jessel, M. R., states the law as follows:

"If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say: 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail youself of them.'" And on page 21: "If it (the representation) is a material representation calculated to induce a person to enter into the contract, it is an inference of law that he was induced by the representation to enter

(9) (1897) A. C. 156=66 L. J. Ch. 253.

(10) (1881) 20 Ch. D 1; 51 L. J. Ch. 113.

into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation." It is to be noted that here again the language used is knowledge of the facts, not suspicion or reason to doubt. *Arnison* v. *Smith* (11) is a case in which certain Directors made an absolutely false statement in a prospectus which they issued, but subsequently sent a circular which, if examined carefully, showed the falsity of the statement. The Court of Appeal held that the circular did not contain an admission of the misrepresentation, nor did it inform the allottees that they could retire and get back their moneys, and that therefore, it was of no avail to the Directors. Lord Halsbury states as follows on page 370: "I do not agree that the circular put any one in the position of knowing the true facts of the case.....Assuming a fraud to have been committed it obviously lies on those who rely on a subsequent explanation to show that such explanation was quite clear." Cotton, L. J., uses the same language, and both he and the Lord Chancellor reserve their opinion as to what would have been the position if the persons who made the representation admitted the falsity of the representation and offered to refund the money paid. It is to be noted that in the above case notice was given directly by the person who had made the false representation, but even then it was held not sufficient as there was no specific admission of the falsity. This case supports the view taken by the learned trial Judge that there being no *restitutio in integrum* the notice is of no avail.

The appellants relied on the case of *Dunston* v. *Paterson* (12). This was an action of false imprisonment against a Sheriff. The defendant pleaded that the plaintiff at the time of the arrest represented herself to be the person against whom the warrant was issued. The plaintiff admitted that that was so, but relied on the fact that at a later stage she gave notice that she was not the person. The Court held that there were two periods of imprisonment, one commencing after the date of her notice, and that as to that second imprisonment she having given notice and it must be assumed having established that she was not the person against whom the warrant had been issued, she was not estopped by her admission. This case does not assist the appellants, as the false representation was definitely withdrawn by the person who had made it and the representee had not altered his own circumstances in consequence of the representation.

I have examined the English cases, because we have the authority of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (13) for the proposition that the law enacted in the Indian Evidence Act does not differ from the English Law on this subject, and it seems to me clear that if we are to find limitations to the right of the representee to claim an estoppel, we cannot go beyond what is to be found in the English cases, there being nothing in S. 115 on the subject. On a strict reading of that section it can only be a question of fact whether a person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. The section says nothing about the representation only operating for one act done in consequence of it, nor does it provide that suspicion, doubt or constructive notice will terminate the representation. As long as a person is acting upon such belief, so long does the estoppel operate.

For these reasons I am unable to accept the argument of Mr. Chamier that the cases above referred to would only apply to the first advance made by the plaintiff Company. In my view the intention of the representation is the determining factor. The 1st defendant put forward the deceased as a major not for the purpose of getting one single advance, but with the intention that the plaintiffs should carry on business with her. He was himself engaged in a similar business; he knew that the terms of the business required a standing advance from the Company; and he also knew the terms of the agreement, Exhibit F. He intended his representation to induce the plaintiffs to carry on business with the widow with a standing advance of Rs. 45,000 and he knew at the time

(11) (1889) 41 Ch. D. 348=61 L. T. 63.

(12) 26 L. J. (N. S.) C. P. 267=2 C. B. (N. S.) 495.

(13) (1893) 20 Cal. 296=19 I. A. 203.

when he opposed her proceedings before the District Judge that her property was mortgaged to cover the standing advance, the stock and the general debit of her account. The representation was, therefore, a continuous one, and the plaintiff Company must be deemed to have made every advance and given every credit to the widow on the faith of that representation. That being so, the case falls entirely within the decisions above referred to, and their being no withdrawal of the representation and no attempt to put the plaintiffs in the position they would have been in but for the representation, the 1st defendent is estopped in respect of all advances and payments made to her.

The next objection raised is that the widow had no right to take up this trade and mortgage the properties as no necessity has been proved, and that the trade was itself of a speculative nature. With regard to the necessity the evidence establishes that at the time of her husband's death the general liabilities of his estate were little less than the assets. This is, however, what one would expect in a trade of this nature, which must be carried on with borrowed capital. The extent of the trade dealings must always be proportionate to the security available for obtaining working capital. The estate may, perhaps, not be called insolvent but if the business had been suddenly closed down, it is clear on the evidence that after realising the properties on a forced sale to pay creditors, there would practically have been nothing left for the widow. By continuing the business she could make a profit, which would, of course, vary according to the value of the skins in the European market, and there is nothing to show that at the date of her death the estate was not as solvent as it was when she began business. The fact that she was able to pay off one large debt and build a new tannery points the other way. The amount of her debit with the plaintiffs at the date of her death, roughly Rs. 25,000, is less than the standing advance of Rs. 45,000 which her husband was allowed and was continued to her. It is true that a witness speaks of the business as speculative, but he means nothing more than that the value of skins is not constant but rises and falls in the European market, a condition which is common to the whole of the exports from this country. To say that a family business of this nature is not to be continued by the widow is practically to confine trade by a widow to petty shopkeeping.

Our attention has been called to a number of cases, including well-known decisions of the Privy Council, on the extent to which a widow may carry on an existing business and the meaning of the word necessity: undoubtedly there are observations in some of the older cases which would debar a widow from continuing a business of this nature. I am, however, very doubtful whether in the altered conditions of the present day, such limitations would be upheld. I have read the judgment of my learned brother sitting with the late Mr. Justice Sundara Aiyar in *Vembu Iyer* v. *Srinivasa Iyengar* (1), where all the older cases are examined and, as it seems to me, the doctrine of necessity is merged in that of benefit to the estate. If that is an extension of the law as hitherto understood, I can only say that I am in entire sympathy with it. It is practically the view taken by the Chief Justice of Bombay in the case of *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (14), which was followed by the learned trial Judge. I entirely agree with him in adopting the reasoning of the Bombay case, and I see no reason why a different standard should be applied to widows in this Presidency.

A small point is taken that the widow increased the business and should not have done so. The fact is not established, the argument being due to a misunderstanding of Exhibit F and a confusion between the standing advance and the amounts credited to her on the discounting of her bills on the firm in England. But even if the stricter limitations of a Hindu widow's rights were to prevail, I am of opinion that they could not avail the 1st defendant or through him the 9th defendant. Just as he is estopped from denying the minority, so also he cannot be heard to raise this latter plea. His consent is established beyond doubt. Indeed his first act on her behalf was to write and ask the Company to advance money not to be utilised in the purchase of skins, but to clear outside debts (*vide* Exhibit JJ), and the request is founded on the reason that the business was a long-standing one which he did not like to give up. In the decision of the Privy Council already referred to, *Sarat Chunder Dey* v. *Gopal*

(14) (1902) 26 Bom. 206.

Chunder Laha (13), the widow, who held the property *benami* for her husband during his life, mortgaged the property after his death, her son representing her in the transaction. Their Lordships used the following words on page 308: "There was a distinct representation by Ahmed (that is the son) professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands.....And it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. In this state of the facts the terms of S. 115 of the Evidence Act directly apply to the case.....and neither Ahmed nor his representative, the plaintiff, can be allowed to deny the truth of what was thereby represented, believed and acted upon." It is in my opinion impossible to distinguish that case from this, bearing in mind the knowledge of the 1st defendant that the carrying on of this business entailed the mortgaging of the properties. In this view I think it is unnecessary to decide whether consent by a reversioner is evidence of necessity or a complete answer as against another reversioner who actually becomes entitled on the death of the widow. But I would observe that the language of the latest decision of the Privy Council in *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (5) seems to indicate that it is something more than evidence of necessity, that it is an equity in favour of the alienee. If so, their Lordships have gone a step further than in the case of *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (15).

One point remains.

The account shows that three sums of Rs. 6,000, Rs. 1,000 and Rs. 1,000 were paid to Ponnusawmi Pillai for the purposes of the trade very shortly after the death of the widow and it is urged that these amounts should be excluded from the account. It is proved, however, by Mr. Simpson that these moneys were advanced for the purpose of preparing the skins for the market (Exhibit ZZ). The account kept by Ponnusawmi Pillai from the date of the death shows that these amounts were expended on the trade, and there is a large credit given to the deceased on 31st May, more than two months after her death, of Rs. 29,420. This represents the value of skins of about Rs. 37,000 and it is a perfectly fair inference that the value of that Rs. 8,000 is to be found in that consignment of skins. No attempt was made to show that the money was misapplied and in those circumstances I am clearly of opinion that the Rs. 8,000 is properly chargeable to the mortgages. The amount of Rs. 1,521, rent of the tanneries, does not appear in the account filed in the suit. Mr. Simpson, P. W. No. 1, states that this amount was kept in a suspense account and should have been credited. That sum will, therefore, be deducted from the amount claimed. With this exception the appeal will be dismissed with costs Appeal No. 63 will also be dismissed with costs.

S.N./R.K.

Appeals dismissed.

(15) A. I. R. (1914) P.C. 128=23 I. C. 162=41 Cal. 793 (P. C.).

A. I. R. 1916 Madras 458

SPENCER AND COUTTS-TROTTER, JJ.

In re *P. Marakkar* and *others*—Accused —Petitioners.

Criminal Rev. No. 860 of 1914 and Criminal Revn. Petn. No. 77 of 1914, decided on 23rd April 1915, from the judgment of Sub-Divl. Magte, Malappuram, in Cr. A. No. 59 of 1914.

Madras Revenue Recovery Act (2 of 1864), S. 8—No provision for the demand in writing described in S. 8 should be delivered to defaulter before distress—Resistence to distress is an offence.

The Madras Revenue Recovery Act does not contain any provision requiring in cases where the defaulter is absent at the time of distraining, that the demand in writing described in S. 8 should be delivered to the defaulter before the distress. A person distraining in these circumstances is not doing anything illegal and resistence to him is punishable as an offence under the Act [P. 459, C. 1 & 2.]

K. Pandalai—for Petitioners.

P. R. Grant—for Public Prosecutor.

Order.—The question is whether the act of the distrainer in this case was legal, so as to make resistance to his act an offence. Dr. Pandalai's main contention is that the only person who can be classed as the 'defaulter' within the meaning of S. 8 of the Madras Act II of 1864 is the person registered as *pattadar*, and that the service on the *pattadar*, whether present or absent, of a demand in writing is a condition precedent to making distraint under that Act.

Taking for granted the first part of this contention to be correct, the difficulty as to the second is that the Act does not contain any provision requiring, in cases where the defaulter is absent at the time of distraining, that the demand in writing described in S. 8 should be delivered to the defaulter before the distress. But it is argued that such a procedure must be assumed to have been intended from the fact that the person liable to pay the arrear is the *pattadar* and that a production of the demand in his absence would be a meaningless act. In construing the Act, we are not inclined to read anything into it which is not expressly stated therein. No provision is made in the Act as to what the distrainer is to do with the written demand in the case of the defaulter not being present when the distrainer arrives on the land, except in the third part of the section which reads thus : "When a defaulter may be absent, a copy of the writing with the endorsement shall be fixed or left at his usual place of residence, or on the premises where this property may have been distrained, before the expiration of the third day, calculating from the day of the distress." This clearly refers to what is to be done after the distress and is not a condition precedent to making it. The section itself and the Board's Standing Order No. 44, paragraph 7, which deals with the procedure in distraint, declare that the demand in writing is to be the distrainer's authority for making the distress. In the form of the demand, as given in the appendix to the Board's Standing Orders, there is a direction which practically reproduces the words of the section that "the distrainer should produce this order, and if the sum due be not at once paid, he may make distress, and on the day on which the property is distrained he should deliver to the defaulter a copy of the order endorsing thereon a list of the property distrained and the name of this place where it is kept." It is obvious that if the defaulter is not present at the spot, it cannot be shown to him then and there. But the arming of the distrainer with a written demand signed by a duly empowered Revenue Officer is an act which serves to distinguish him from a thief or trespasser in the eyes of the tenant or mortgagee in occupation of the land. S. 11 of the same Act provides for a tenant whose crops, are attached for an arrear of revenue paying the arrear and deducting the amount from any rent due by him to the *pattadar*. It thus appears that the production of the written demand is not such a meaningless act as it might be thought, and that the provision for the delivery on the same day of a copy to the defaulter is only intended to apply when the defaulter is present. The petitioners cannot rely on any omission to furnish the defaulter with a copy of the demand *after* the distraint was made as an excuse for resisting the distraint. We consider that P. W. No. 1, when making the distraint in the absence of the *pattadar* who lived twenty miles away, did all that was required of him by law. The point of law now raised was not decided in *Queen-Empress* v. *Ramasami* (1), which Dr. Pandalai has cited in favour of his contention.

The sentences imposed for the offences committed by the petitioners in defying the authority of the Revenue Officers are not, in our opinion, excessive.

The criminal revision petition is dismissed.

S.N./R.K.

Petition rejected.

(1) (1893) 16 Mad. 364 ; 1 Weir 422.

A. I. R. 1916 Madras 459

SADASIVA AIYAR AND HANNAY, JJ.

Venkataramanachari—Plaintiff—Appellant.

v.

Thirunaranachari and *others*—Defendants—Respondents.

Second Appeal No. 711 of 1913, decided on 2nd December, 1914, against the decree of Dist. Judge, South Arcot, in Appeal Suit No. 199 of 1912.

(a) Deed—Construction—Mortgage by mother mentioning as executed for husband s debts, and mortgaging property in possession of herself and her son, will be presumed to be executed on behalf of minor son.

Where a mortgage-deed executed by the mother of a minor mentions that the mortgage is made in order to discharge her husband's debts and also contains a reference to the property being in the enjoyment of herself and her minor son after her husband's death :

Held, that the mortgage-deed can be fairly construed to be one executed by the mother on behalf of her son. [P. 461, C. 2.]

(b) Adverse possession—Incorporeal rights—There can be no adverse possession of incorpo real rights of mortgagee by denial.

Where a mortgagee has only an incorporeal right and is not entitled to possession of the mortgaged properties, the mortgagor's denial of the mortgagee's right cannot make him get possession of the incorporeal right nor can such incorporeal right be possessed adversely by the mortgagor by a mere denial. [P. 462, C. 1.]

L. S. Viraraghava Iyer—for Appellant.

B. Narasimha Rao—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant. The plaintiff's claim as finally put forward is for the recovery of Rs. 1,100 due on a hypothecation bond of 25th June 1878 executed to the plaintiff's father by one Narasammal, who was on the date of that document the guardian and protector of her mioner son, Venkataramanaachari. Venkataramanachari sold the lands to his sister's husband (the 1st defendant) in 1900, the defendants Nos. 2 and 3 being the 1st defendant's sons. The suit was brought in August 1910 within the two years allowed by S. 31 of the new Limitation Act.

The learned District Munsif in an exhaustive judgment dismissed the suit on the following ground. Narasammal did not purport to execute the document, Exhibit A, as guardian of her minor son to whom the mortgaged property belonged. Hence her mortgage document of 1878 was not binding on her minor son and, therefore, it is not binding on the vendee from her son, namely, the first defendant. (The sale by the son was made after he became a major).

On appeal, the learned District Judge held that having regard to the recitals in Exhibit A and to the nature of the transaction and to the fact that Exhibit A was executed by Narasammal with the intention of binding her husband's estate on behalf of her minor son in a legal manner, she must be deemed to have executed the document as guardian and manager of his property and hence it was binding upon the minor; he thus differed from the view of the learned District Munsif on this point. But he held that the plaintiff's father having brought a suit, Original Suit No. 355 of 1883, for certain reliefs against Narasammal on this same bond of 1878 and having omitted in that suit to pray for a relief against Narasammal's son's interest in the hypothecated property, the plaintiff's present suit is barred under O. 11, R. 2 (old S. 43), of the Civil Procedure Code. On this ground, therefore, he confirmed the District Munsif's decree dismissing the plaintiff's suit. We think that the learned District Judge's view that the present suit is barred by O. 11, R. 2, cannot be supported. The cause of action on which Original Suit No. 353 of 1883 was based was one directed against Narasammal in her personal capacity and it was not a suit directed against her son and his interest in the mortgaged properties. In a subsequent suit, Original Suit No. 242 of 1886 brought by the plaintiff's father against Narasammal's son, it was decided by the District Court on appeal that the decree in the suit, Original Suit No. 355 of 1883, must be deemed to have been passed against Narasammal in her personal capacity and against any interest which she had in the mortgaged property, such interest being found to be *nil*. The present suit, however, is against the interest of her son, Vekataramanachari, in the mortgaged properties. the 1st defendant, who purchased from Venkataramanachari, being now the owner of such interest. As Sir V. Bhashyam Aiyangar, J., said in the case of *Dampanaboyina Ganji* v. *Addala Ramaswami* (1): "This clearly shows that the cause of action is not an obstruction, something independent of the defendant, but that the plaint should disclose a cause of action against the defendant. And S. 43 only provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that if a plaintiff omit to sue in respect of any portion of his claim arising from the cause of action for the enforcement of which the suit is brought, he shall not afterwards sue in respect of the portion so omitted." In the light of these observations, it is clear that the cause of action against Narasammal on which Original Suit No. 355 of 1883 was brought having been conclusively (as between the plaintiff and 1st defendant's vendor) decided in Original Suit No. 242 of 1886 to be only a cause of action directed against Narasammal personally and against her interest if any, in the mortgaged property, the present suit based on a cause of action directed against her sons's interest in the mortgaged property and against the purchaser from her son is not the same cause of action as that on which Original Suit No. 355 of 1883 was brought and hence O. 11, R. 2, cannot be a bar. In fact Mr. Narasimha Rao, the learned Counsel for the respondent, did not argue that the present suit was barred under

(1) (1902) 25 Mad. 736.

O. 11, R. 2. But Mr. Narasimha Rao attempted to support the dismissal of the plaintiff's suit on several grounds decided against him by the lower Courts, which, of course, he was entitled to do. He contended that this suit was barred by *res judicata* by reason of the decision in Original Suit No. 242 of 1886. To understand this plea of *res judicata*, it is necessary to give some details of that suit. The plaintiff's father having obtained an *ex parte* decree against Narasammal and her interest in the mortgaged property in Original Suit No. 355 of 1883, attached the said property (according to the old and mistaken and unnecessary procedure followed by Mofussil Vakils) in order to bring it to sale in execution of his mortgage decree. Then Venkataramanachari, Narasammal's minor son, through a guardian, put in a claim petition on the ground that his mother (the judgment-debtor) had no interest in the mortgaged property which was attached in execution. His claim was allowed. Thereupon the plaintiff's father brought the suit, Original Suit No. 242 of 1886 (within one year of the order in favour of the minor son, Venkataramanachari) for establishing his right to bring the property to sale in execution of the decree in the suit of 1883. The District Munsif decreed the plaintiff's father's suit, taking the view that Narasammal incurred the debt for the benefit of her minor son, that the decree debt in Original Suit No. 355 of 1883 was binding upon that son and that, therefore, the property including the son's interest could be brought to sale in execution of that decree. On appeal, the District Judge took the view that though the debt was incurred by Narasammal for her son's benefit, as she did not purport to execute the bond as her son's guardian and as the decree was passed against her alone without making her minor son a party, the plaintiff's father could not bring the property to sale in execution of the decree passed against the mother. He, therefore, dismissed that suit (Original Suit No. 242 of 1886). Mr. Narasimha Rao argued that that decision, which held that the minor son's interest in the property could not be brought to sale for the mortgage debt incurred by Narasammal, is *res judicata* in this suit. But I am of opinion that the District Judge in this case has given a sufficient answer to this contention. In the words of the learned District Judge, the only point raised in that suit (Original Suit No. 242 of 1886) was whether the decree obtained in Original Suit No. 355 of 1883 was a decree which could be executed against Narasammal's son and his property. The question whether a suit could be brought upon that mortgage bond against Narasammal's son and his interest in that property and whether a decree could be obtained in such a suit against Narasammal's son's interest in the property, was not put in issue in that suit No. 242 of 1886 and was not decided by the Appellate judgment in that suit.

Mr. Narasimha Rao next contended that the lower Appellate Court was wrong in its view that the document, Exhibit A, executed by Narasammal could be treated as a document executed by her in her capacity as guardian of her minor son; on the true construction of Exhibit A, having read the document more than once carefully, I agree with the learned District Judge that it could be fairly construed, without any violence to the ordinarily accepted rules of construction, as one executed by her on behalf of her minor son. In *Murari* v. *Tayana* (2), the mother of a minor sold the property of her minor son to pay off her husband's debts. No reference whatever was made in the sale-deed to the existence of the minor son. Not only that, she said in the deed that she sold whatever interest she had in the property. And yet it was held that as she purported to sell the land itself and said that she sold the land to pay off her husband's debts, her intention was to use her authority as her minor son's guardian to sell the land in order to pay off her husband's debts, and that when she thus had the full authority and also the intention to so sell, her act effectually conveyed the property of her son, notwithstanding that it was not correctly described as property belonging to her son. In the present case the mortgage-deed, Exhibit A, executed by Narasammal not only mentions that the mortgage was made in order to discharge her husband's debts, but it also contains a reference to the property being in the enjoyment of herself and her minor son after her husband's death. A liberal interpretation of such documents is justified by the observations of the Privy Council in *Hunooman Persaud Panday* v. *Musammat Babooee Munraj Koonweree* (3) and by the opinion of Sir Barnes

(2) (1896) 20 Bom. 286.
(3) (1854-57) 6 M. I. A. 393=18 W. R. 81.

Peacock, C. J., in *Judoonath Chuckerbutty* v. *James Tweedie* (4).

Mr. Narasimha Rao finally argued that Narasammal's son's guardian having set up in 1886 in the suit, Original Suit No. 243 of 1886, that the mortgage executed by his mother did not affect his interest in the mortgaged property, there was a sort of adverse possession of the mortgagee's interest under Exhibit A, held by Narasammal's son from that date and that the mortgagee thereby lost his rights in the mortgaged property by adverse possession for twelve years in Narasammal's son and his alienees. I have found it somewhat difficult to understand this ingenious argument. The mortgagee had only an incorporeal right and he was not entitled to possession of the mortgaged property. How the mortgagor's denial of the mortgagee's right could make the mortgagor get possession of the incorporeal right of the mortgagee, or how such incorporeal right, which did not carry with it the right to physical possession of the mortgaged property and did not carry with it in favour of the mortgagee any right to get the rents or profits of the mortgaged property, could be possessed adversely by a mere denial of such incorporeal right, I am unable to see [See also the judgment in *Lakshminarayana Aiyar* v. *Ulagammal* (5) in which a similar contention as to adverse possession of an incorporeal right was negatived by us and which judgment was pronounced to-day].

In the result, in reversal of the decrees of the lower Courts, I am inclined to give the plaintiff a decree for the sum of Rs. 1,100 claimed as due under Exhibit A on the date of suit, with interest on the principal sum of Rs. 200 at 1¼ per cent. per mensem from the date of suit till the expiry of three months from this day and with other provisions usual in preliminary mortgage decrees mentioned in O. 33, R. 4, Civil Procedure Code. Interest shall cease to run on the Rs. 200 after the expiry of the three months. Under the circumstances we order the parties to bear their respective costs throughout.

Hannay, J.—I concur.

S: N./R. K.

Appeal allowed.

(4) (1869) 11 W. R. 20.
(5) (1915) 26 I. C. 528.

A. I. R. 1916 Madras 462

WALLIS, C. J. AND SRINIVASA AIYANGAR, J.

Peesapati Sitaramanujachari and *another* —Plaintiffs—Appellants.

v.

Kanduri Vellamma—Defendant—Respondent.

First Appeal No. 239 of 1914, decided on 18th August, 1915, from the decree of Dist. Judge, Vizagapatam, in Original Suit No. 7 of 1913.

Hindu Law—Religious endowment—Temple—What is dedication for public worship is explained—What is not sufficient to derogate from public character of a temple or to make it private property pointed out.

One *S*, the paternal uncle of the defendant's husband, built a temple in 1830 and dedicated it to Sri Venkateswaraswami. Idols were installed. Servants such as *Archakas*, *Vedaparayanam* and *Adhyapakam* office holders and others usually employed in public temples were appointed. There was no difference between this temple and other public temples so far as the performance of *puja* and other services was concerned. Ever since it was built the temple was under the management of the defendant and her predecessors-in-title as *dharmakartas*. The public were freely allowed to worship therein and perform vows, and there was nothing to show that the public had to obtain the permission of the *dharmakarta* therefor. It also appeared that when the temple lands had to be enfranchised *inam pattahs* were issued in the name of the idol. Some lands were also given to the temple by a stranger to the family. There was also a will in which the defendant's husband was described as a *dharmakarta*:

Held, that the above facts clearly established that the suit temple was dedicated for public worship. [P. 463, C. 1 & 2.]

Held, further, that the fact that the food cooked in the temple and offered to the idol was used by the defendant, that the temple servants rendered services to her also, that the will contained elaborate provisions regarding the management of the temple, and that no accounts had been maintained by the defendant or her predecessors-in-title of the management of the temple properties, did not in any way derogate from the public character of the temple and were quite insufficient to prove that it was the private property of the defendant. [P. 463, C. 2.]

M. O. Parthasarthi Iyengar and *V. Ramesam*—for Appellants.

B. N. Sarma—for Respondent.

Srinivasa Aiyangar, J.—The question for decision in this appeal is whether the suit temple is a private temple or a public temple. The temple was built in 1830 by one Singarachary, the paternal uncle of

the defendant's husband, in the village of Bhyripuram. The temple was dedicated to Sri Venkateswaraswami. The defendant and her predecessors are styled *dharmakartas* of the temple (Exhibits I, III and IV).

A fixed stone idol was installed in the temple and also copper idol to be taken out in processions. *Archakas* or priests were appointed to make the *puja* or worship as also reciters of *Veda* and Tamil *prabandhams* and other servants usually employed in public temples. In fact the *puja* and other services in the temple in no way differ from those in a public temple. It is admitted that the general public, ever since the construction of the temple and the consecration of the idols, have been worshipping in the temple. It is said that they do so with the permission of the *dharmakarta* for the time being. There is, however, no evidence that any such permission was ever asked for. The witnesses for the plaintiffs say that all caste Hindus have a right to worship in the temple, and the evidence for the defendant materially corroborates this. Defence witness No. 1 says in his cross-examination that " *Vaishnavas* have a right to worship god in the temple. *Brahmins*, *Kshatriyas* and *Komatis* have a right to get worship done through the *Archakas*. People of all castes may make offerings to God. Such offerings were never refused. Even defandant's enemies worship at the temple." Defence witness 3 says " that all the three castes have a right to make worship and give offerings at the suit temple. As defendant is trustee she has the right to allow or refuse admittance to the temple without assigning reasons. She never to my knowledge refused admittance." Her fourth witness says in his examination in-chief " that the temple is under the *dharmakartaship* of the defendant. It belongs to God Venkateswaraswami," and in cross-examination " the defendant cannot appropriate the lands to her use, nor alienate them. All people can worship and offer *bhoyams* at the suit temple only through *archakas*. Defendant has never hitherto refused permission to worship." It is also clear from the evidence, especially paragraphs 13 and 14 of Exhibit IV, that the general public have been making offerings, and fulfilling vows in the temple. Another important circumstance is that the lands belonging to the temple were enfranchised and *inam pattahs* issued in the name of the idol. Exhibit C shows that a person who was a stranger to the defendant's family gave some lands to the temple. Further, the will, Exhibit IV, shows that with respect to the temple and its endowments the defendant's husband was merely a *dharmakarta* or trustee. The evidence above set out clearly establishes that the suit temple was dedicated for public worship.

The defendant, however, relies on the following facts to prove that the temple is her private temple *viz*., that the food cooked in the temple and offered to the idol is used by the defendant ; that the temple servants also render service to her ; that the will, Exhibit IV, contains elaborate provisions for the management of the temple which ordinarily a trustee of a public temple would have no power to make ; and that no accounts were kept by the defendant or her predecessors of the management of the temple properties. It appears that the bulk of the property of the temple was given by the defendant's husband and his uncle, they were also the hereditary trustees ; and it is, therefore, not unlikely that they, sometimes, arrogated to themselves powers which they did not possess. They are quite insufficient to prove that the temple is a private temple. It is very unusual for a Hindu in Southern India to construct a temple outside his dwelling house for private worship. I am, therefore, unable to agree with the learned District Judge on this point.

The District Judge finds that no misconduct or negligence has been proved against the defendant in the management of the temple or its properties, and I agree with him. As I find that the temple is a public temple, the defendant is bound to maintain accounts of her management of the temple and its endowment.

The respondent contends that the sanction of the Collector, Exhibit A, is vague and also that the plaintiffs, who are only two out of the large number of persons to whom sanction was given, are not entitled to sue under S. 92 of the Civil Procedure Code. But as the two plaintiffs have obtained the sanction of the District Court under the Religious Endowments Act, it is unnecessary to decide this point. I would reverse the decree of the District Judge and declare that the suit temple is a public temple and direct the defendant to maintain accounts of her management of the temple and its endowments.

As regards the costs, in the circumstances of this case I would direct each party to bear his own costs throughout.

Wallis, C. J.—I agree. Having regard to the ideas prevailing among Hindus in this part of India, I think there is sufficient evidence of an intention to dedicate these properties for public charitable purposes, that is to say, for the purposes of a temple for the use of Hindu worshippers.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 464

AYLING AND SESHAGIRI AIYAR, JJ.

Sathyabhama -- Plaintiff—Appellant.

v.

Kesavacharya - Defendant—Respondent.

Second Appeal No. 2506 of 1913, decided on 1st April, 1915, against the decree of Dist. Judge, South Canara, in A. S. No. 46 of 1913.

(a) Hindu Law—Maintenance—Widow—Even written agreement of maintenance is unenforceable on subsequent unchastity.

The rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance, applies even where that right is secured to her by an agreement in writing. 17 Mad. 392 and 26 All. 321, Dist. [P. 464, C. 2.]

(b) Hindu Law—Maintenance—Widow—Unchaste widow if repentant can get starvation allowance.

An unchaste Hindu widow, if she repents of her conduct and leads a moral life on the date of suit, is entitled to at least a starvation allowance. 5 M. H. C. R. 150; 34 Bom. 278; 19 Mad. 6; 16 I. C. 389, dist. and 17 Cal. 674, Foll. [P. 465, C. 1.]

H. Balakrishna Rao – for Appellant.

B. Sitaram Rao – for Respondent.

Judgment.—This is a suit by a widow against her deceased husband's brother for maintenance. There was an agreement on the 30th April, 1906 by which the amount was fixed. The plea of the defendant is that since the date of the agreement, the plaintiff had been leading an immoral life and that consequently she is not entitled to claim maintenance. The Courts below have found that she did lead an immoral life, but that, at the time of the suit, she had reformed her ways and was living with her people. Mr. B. Sitarama Rao wanted to argue that she had gone wrong with a *Sudra*, that that entails upon her degradation from caste and that consequently she is not entitled to any maintenance. But there is no finding that the pregnancy which is found, was caused by co-habitation with the *Sudra*. We cannot allow that question to be argued in second appeal

On the facts found by the Courts below the question for consideration is, whether the plaintiff is not entitled to what is called "starving allowance" from the defendant. It was argued in appeal that the fact that the maintenance was secured by a deed differentiated this case from *Nagamma* v. *Virabhadra* (1). We cannot accept this contention. The instrument is only evidence of the amount which is payable as maintenance. The basis of the claim against the defendant being the duty to maintain, the fact that it is secured by a deed in writing is not a reason for holding that subsequent unchastity would not work a forfeiture. The decision in *Bhup Singh* v. *Lachman Kunwar* (2) related to a compromise which was arrived at regarding the claim of the widow for possession of the property as heiress. It was held that the subsequent unchastity of the widow did not deprive her of this property. That decision has no bearing upon the present case. The right to maintenance is dependent upon texts which do not affect succession or inheritance.

There is no direct authority upon the question. The text of Manu in Chapter XI, S. 189, applies to all women entitled to maintenance. Under that text if a woman becomes unchaste, she is entitled to a starving allowance. The Prayaschitha Kanda of Yajnavalkya Smrithi, (verses 297 and 298) lays down the rules regarding provisions to be made for women who have misconducted themselves. It has been suggested by the learned Vakil for the respondent that the verses only apply to cases of women who have committed sins other than immorality; but the concluding portion of the commentary of Vijnaneswara on the Smrithi makes it clear that the two verses are intended to cover cases of unchaste women. The commentary is this: "To those women who though have suffered degradation (from caste) and for whom the rites of presenting (disconnecting) water libations, etc., have been performed accommodation, (that is), a small cottage built of straws and leaves

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(1) (1894) 17 Mad. 392.
(2) (1904) 26 All. 321.

should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description *along with (the protection) of preventing her from being enjoyed again by another man should be given.*" This last sentence makes it clear beyond doubt that the commentator had in mind the case of fallen women. The text and the commentary, it is conceded, apply to all women alike whether they be wives, widows of co-parceners or mothers. Therefore, according to Manu and Yajnavalkya women who have gone wrong should be given some maintenance. The punishment for their unchastity is that they lose their right to the ordinary rate of maintenance. As against these two texts, the well-known text of Narada has been quoted which says that if a widow of a co-parcener is guilty of immorality, her maintenance should be resumed. This statement is quoted and commented upon by all the Smrithi writers (Mayukha, S. 8, placitum 6; Smrithi Chandrika, Chapter XI, S. 34, and Viramitrodaya, Chapter III, Part I, S. 10). But in none of these texts there is any provision for a woman who had repented and was subsequently leading an honest life. It is not to be presumed from the omission to provide for such a contingency, that the presumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance. This question was raised in *Visalatchi Ammal* v. *Annasamy Sastry* (3) but was left undecided. In *Nagamma* v. *Virabhadra* (1) the learned Judges following certain Bombay decisions, held that a widow who had misconducted herself was not entitled to maintenance. In the latest Bombay case, *Parami Ramayya* v. *Mahadevi* (4), the earlier cases are not approved. In the Madras case, the question whether subsequent reformation would make any difference, was not considered. In *Kandasami Pillai* v. *Murugammal* (5), the learned Judges based the decision on the ground that the fallen woman had tried to foist upon her husband a child who had been born of adulterous intercourse and it was decided that such a woman was not entitled even to a starving allowance. This decision in *Kandasami Pillai* v. *Murugammal* (5) was considered by Miller and Sankaran Nair, JJ., in *Subbayya* v. *Bhavani* (6), and the learned Judges were of opinion that it should be confined to cases where the woman was continuing to lead an immoral life. In *Chirukula Nagalakshmamma* v *Chirukula Visvanatha Sastri* (7), the wife was not shown to have repented of her misconduct. Mr. B. Sitarama Rao argued that the decision in *Subbayya* v. *Bhavani* (6) should not be extended to widows of co-parceners. As pointed out already, both the text of Manu and that of Yajnavalkya make no distinction between wives and other women, and we see no reason on principle why the widow of a co-parcener should be in a less advantageous position than the wife on the question of being allotted a starving allowance. There are observations in *Rama Nath* alias *Ramanund Dhur Poddar* v. *Rajonimoni Dasi* (8) to the effect that widows who had repented of their misconduct should be given a bare maintenance. The recent decision in *Parami Ramayya* v. *Mahadevi* (4), although it related to the case of a wife contains observations regarding the rights of other women to compassionate allowance. We see no reason for not applying the principle enunciated in that decision to the case before us. We think that the widow is entitled to some maintenance, although she is not entitled to the rate provided for in the deed. The Courts below have found that Rs. 24 a year may be awarded to her in this behalf. We accept that finding. We reverse the decrees of the Courts below and decree maintenance at Rs. 24 a year, from January, 1911 till the date of suit. Each party will bear his or her own costs throughout.

S.N./R.K.

Appeal allowed; *Decree reversed.*

(3) (1869-70) 5 M. H. C. R, 150.
(4) (1910) 34 Bom. 278 = 5 I. C. 960.
(5) (1896) 19 Mad. 6.

(6) A. I. R. (1914) Mad. 665 = 24 I. C. 390.
(7) (1912) 16 I C. 389.
(8) (1890) 17 Cal. 674.

A. I. R. 1916 Madras 465

COUTTS-TROTTER AND SRINIVASA AIYANGAR, JJ.

Suppa Bhattar—Defendant—Appellant.

v.

Suppu Sokkaya Bhattar and *others*—Plaintiffs—Respondents.

First Appeal No. 280 of 1913, decided on 20th August, 1915, against the decree

of Sub-Judge, Madura, in Ordinary Suit No. 88 of 1911.

(a) Evidence Act (1 of 1872), S. 44—Judgment against persons then interested is binding on grounds mentioned, against all persons subsequently getting title—It can be challenged on ground of want of jurisdiction—Civil P.C. (5 of 1908). S. 11.

A judgment of a Court of competent jurisdiction pronounced against the only person or persons, who, at the time of such judgment, had any interest which would entitle them to resist the plaintiffs' title, is conclusive against all the world as to the facts stated in it and any person not a party to the suit in which it was pronounced but whose title is subsequent in origin, cannot question it on any of the grounds stated in it, except on the ground of its nullity for want of jurisdiction in the Court which pronounced it. 36 Mad. 141; 33 Mad. 483; *Elliott Et. A*. v. *The Lessee of Peirsol. Et. Al*, 7 Lawyer's Edition 164; 25 Bom. 337 (P.C.); 26 Mad. 31, Foll. A. I. R. (1914) Cal. 281; 7 Mad. 341 and 12 W.R. 21, Dist. [P. 467, C. 2.]

(b) Adverse possession—Office—Proof of performance of duties and not possession of lands is necessary to show adverse possession of office.

Title to an office by adverse possession can be claimed only by performance of duties attached to the office and not by possession for the statutory period of the *manibham* lands attached to it. 28 Mad. 197; A. I. R. (1914) P. C. 72; 8 I. C. 998 and 6 C. L. J. 621, Ref. to.]P. 467, C. 2 & P. 468, C. 1.]

(c) Limitation Act (9 of 1908), Arts. 124 and 141—Whether Art. 124 or 141 applies to suit for possession of hereditary office. (Quære).

Quære.—Whether a suit for possession of an hereditary office on the death of a limited owner is governed by Article 124 or Article 141. [P. 467, C. 2.]

A. Krishnaswami Aiyar—for Appellant.

T. Narasimha Aiyangar and *C. S. Venkatachariar*—for Respondents.

Coutts-Trotter, J.—The facts which gave rise to this appeal are as follows: A certain Chandrasekara Bhattar was entitled to certain *manibham* lands appertaining to the office of *alankara miras* in a temple in Madura. He died on the 3rd May, 1881. He had no children, but he left a widow called Thalamuthammal: he also had a nephew called Rajah Bhattar, who succeeded him as *alankara mirasdar* and enjoyed the properties partly under a will alleged to have been made by Chandrasekara Bhattar before he died and partly by an agreement with Thalamuthammal. Raja Bhattar died on the 25th January, 1882, leaving a widow Akilandammal. Questions arose between the two widows, but they were settled by agreement, and Thalamuthammal went into possession of the lands and remained in possession till her death in 1885. Meanwhile, the plaintiff who is found by the lower Court to be the nearest agnate of Rajah Bhattar brought a suit, Original Suit No. 15 of 1882, to establish his reversionary rights, apparently considering those rights jeopardised by the arrangement between the ladies. He impleaded Akilandammal and Thalamuthammal as defendants together with Kuppa Bhattar, the present 4th defendant, and Deivasikamani Bhattar, the present 6th defendant, as heirs of Thalamuthammal who had died during the pendency of that suit. In that suit the defendants raised the plea among other matters that the alleged will of Chandrasekara Bhattar was not genuine, because without the will the chain of devolution to the plaintiff was broken on Chandrasekara's death. The suit was decided in favour of the plaintiff; and he obtained a declaration, as against the defendants he had impleaded, that he was entitled to succeed to the properties and the office on the death of Akilandammal. Akilandammal died some time in 1910, and as by this time the defendants were setting up claims to the office and its emoluments, the plaintiff brought the present proceedings against them to establish his right to the office. What happened to the office and who performed its duties during the first few years after Rajah Bhattar's death does not appear. But in August 1888 the Committee of the Devasthanam appointed the 1st and 2nd defendants to do the duties of the office (See Exhibits R and S). It is possible this was only giving sanction to an already existing arrangement. At a later date the 1st and 2nd defendants seem to have associated with themselves the 3rd and the 6th defendants in the discharge of the duties of the office.

The present suit came on for hearing in October 1912 and was decided in February 1913 in favour of the plaintiff. The 7th defendant appeals against the judgment. The plaintiff at the trial relied upon the prior judgment in Original Suit No. 15 of 1882 as debarring the defendants from re-opening the question of the genuineness of the will of Chandrasekara Bhattar, and the learned Subordinate Judge so held, regarding the matter as governed by the doctrine of *res judicata*. His view

was that, though the 7th defendant was not a party to the prior proceedings, yet as other reversioners who stood in the same right were impleaded, the fact that the 7th defendant was not a party did not prevent the judgment from being binding upon him. Whether on the supposed facts the decision would have been right may be open to question. Mr. Krishnaswami Aiyar cited a large number of cases to show that it was erroneous; but it is unnecessary to decide this matter, because on further examination in this Court it appeared clearly that the facts were not as the lower Court supposed them to be. At the time when judgment was given in Original Suit No. 15 of 1882 Thalamuthammal had died. The 3rd defendant in that suit, Kuppa Bhattar, the present 4th defendant, was a degree nearer the common ancestor than the present 7th defendant, and was, therefore, not a reversioner at all but the legal heir of Chandrasekara Bhattar; and the present 7th defendant was not even a reversioner and had no interest in the matter. The position then was this : the plaintiff had brought before the Court the legal heir of Chandrasekara Bhattar, to whom it was conceded the properties had originally belonged and through whom any title to them must ultimately be traced. Those proceedings definitely determined the issue as to the rightful succession to Chandrasekara as between the present plaintiff and Chandrasekara's nearest descendant. The question is, whether the present 7th defendant who at the date of that judgment had no interest in the properties and whose interest, if any, arose subsequently can be heard to challenge it. It is quite clear that the judgment is not binding on him either as a judgment *in rem* affecting status or as a determination of a matter whereto he was a party or privy. But it is contended that the judgment formed a link in the plaintiff's title and that as such it cannot be challenged by any person who has not a claim prior in origin and paramount to the claim of Chandrasekara's heir. It is strange that in a matter of this importance there should be a complete absence of English authority. The principle contended for by the plaintiff has, however, often been recognized in American decisions and is expounded in two text-books of authority, Black on Judgments, Volume 2, S. 607, and Bigelow on Estoppel (6th Edition), pages 50 and 167. It has also been recognised by a judgment of this Court in *Sayam Ramamurthi Dhora* v. *Secretary of State for India in Council* (1). I guard myself from assenting to all the reasoning of that judgment; in particular I think the passages cited from Littleton and Lord Coke have no bearing on the present question and refer to what now-a-days would be called judgments *in rem*. But I assent to the principle of the judgment which I take to be this: that where a link in the chain of a party's title consists of a decree of a Court of competent jurisdiction pronounced against the only person or persons who at the time of such decree had any interest which would entitle them to resist the plaintiff's title, no person whose claim is subsequent in origin can challenge that decree, or go behind it or challenge the plaintiff's title as at that date on any ground which was determined by that decree as a necessary step in its result. On this short ground I am of opinion that it is not open to the 7th defendant in these proceedings to maintain the invalidity of Chandrasekara's will either as an imperfect testamentary instrument or as alienating properties which, by law, are inalienable.

In these circumstances, the plaintiff having established what I may call his paper title, the only plea open to the defendant is that of limitation. The learned Subordinate Judge decided that the Article of the Limitation Act which applied was Art. 141. I will assume for the present purposes that the defendant is right in contending that the proper Article to apply is Art. 124 in accordance with the decision in *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (2). The question then arises, what kind of possession must have been enjoyed by the defendant to defeat the plaintiff's title? There is no doubt evidence to show that the 7th defendant has had possession of the lands attached to the office of *alankara miras* for more than the statutory period, and it is contended on his behalf that possession of the lands was sufficient without it being necessary to show that he performed the duties of the office.

(1) (1913) 36 Mad. 141=19 I. C. 656.
(2) (1905) 28 Mad. 197.

That view is contrary to the decision in *Bhaiaji Thakur* v. *Jharula Das* (3). It is also contrary to at least one decision of this Court, *Kamalathammal* v. *Krishna Pillai* (4). It is enough for me to say that I respectfully agree with those decisions and hold that possession of the lands alone will not suffice. There is no evidence at all in this case that the 7th defendant ever actually performed the duties of this office. But it is said there is evidence that the 6th defendant performed those duties, and as the 6th and 7th defendants were jointly entitled to a fourth share of Chandrasekara's original office, the 6th defendant's performance of its duties must be held to have been undertaken on behalf of himself and the 7th defendant also. All that I need say as to that is that there is no evidence that the 6th defendant believed himself or stated himself to be performing the duties on behalf of anybody except himself ; there is not even any evidence that the 6th and 7th defendants were undivided brothers. In the absence of such evidence it would, in my opinion, be quite wrong to defeat the right of the true owner by straining legal doctrines of presumptive representation.

In my opinion, the appeal fails and should be dismissed with costs to the first respondent to be taxed on one-eighth of the valuation of the memorandum of appeal, which is the share claimed by the only appellant.

I should like to add that the fact that I have referred in my judgment only to two or three of the very large number of cases cited in the arguments does not mean that I consider the citation of those cases to have been irrelevant. The fact is that the learned Subordinate Judge based his judgment on a number of untenable grounds, and it was only gradually in the course of the argument that it was possible to focus the discussion on to the two real questions.

With regard to the memorandum of objections filed by the 18th defendant, I see no reasonable ground for depriving him of costs on which a discretion could be judicially exercised to do so. His memorandum is, therefore, allowed with costs.

(3) A. I. R. (1914) (P.C.) 72=24 I. C. 501=42 Cal. 244.
(4) (1910) 8 I. C. 998.

Srinivasa Aiyangar, J.—Though the hearing of this appeal took some time, the questions which arise for decision are fairly simple and lie in a small compass.

Plaintiff sues to recover possession of certain lands attached to an office in the Meenakshi temple at Madura. He claims to be the office holder. The office is a hereditary one and admittedly belonged to one Chandrasekara Bhattar. Plaintiff relies on a judgment in Original Suit No. 15 of 1882 on the file of the Subordinate Court, Madura, which finally established as against Chandrasekara Bhattar's heir, the present 4th defendant, the title of the plaintiff to succeed to the office as the heir of one Rajah Bhattar the devisee under the will of, Chandrasekara Bhattar after the death of Rajah Bhattar's widow who was then alive. The 7th defendant who is the only appellant here had admittedly no title on the date of that adjudication and all persons who could possibly be interested in the title to the office were parties to that adjudication. The judgment is relied on by the plaintiff as the final link in the chain of his title just in the same way as the plaintiff could have relied on a transfer of the property in his favour by the heir of Chandrasekara Bhattar. I have no doubt that for this purpose the judgment is relevant. As stated in Black on Judgments, Volume II, S. 604, "for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive to prove that fact. The mere fact that such a judgment was given can never be considered as *res inter alios acta*, neither can the legal consequences of a judgment be so considered. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, and consequently may or may not be evidence according to circumstances, considering the nature of the facts themselves and the parties," and in another place, Volume I, S. 4, (page 10) it is stated that "another consequence flowing from the rendition of a judgment is that it may constitute either an evidence or a source of title." Mr. Krishnaswami Aiyar, who appeared for the appellant, did not seriously

contest this position. He contends that inasmuch as he was not a party to the previous adjudication he is entitled now to impeach the correctness of that judgment. I think he is not entitled to do that. Just as a transfer from the heir in favour of the plaintiff would have given the plaintiff a title to the property as against the whole world, so likewise the adjudication established the title of the plaintiff to the office in question as against all the world. I assume, of course, that the property was Chandrasekara's and all the persons who had any claim to his properties were parties to the previous litigation. On this question the decisions of this Court in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (5), *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (1) and in Second Appeal No. 574 of 1909 referred to therein are conclusive. The principle is clearly stated in the judgment just now delivered, and I respectfully agree. Mr. Krishnaswami Aiyar referred us to the case of *Peari Mohan Shaha* v. *Durlavi Dassya* (6) as being an authority against this position; but that case is clearly distinguishable inasmuch as the title claimed by Durlavi was a title paramount to the title of the parties to the previous adjudication. The cases reported as *Ramnad Zemindar* v. *Dorasami* (7) and *Goluck Monee Debia* v. *Ram Monee Bose* (8) are also distinguishable. I am, therefore, of opinion that the 7th defendant is not entitled to question the correctness of the previous judgment; he would, however, be entitled to show that the previous judgment was a nullity just as he would be entitled to show that a conveyance by the heir of Chandrasekara Bhattar in favour of the plaintiff was void; but the grounds for declaring a judgment a nullity would obviously be different from the grounds on which a conveyance would be declared void. I think the only ground on which a judgment could be declared a nullity is an absolute want of jurisdiction in the Court over the parties or the subject-matter. "Where a Court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments of sentences are considered in law as trespassers." *Elliott Et. Al.* v. *The Lessee of Peirsol Et. Al.* (9), *Malkarjun* v. *Narhari* (10). Mr. Krishnaswami Aiyar contended that the previous judgment was void, because it established the validity of an alienation of a religious office which is against public policy, and in support of his position relied on the decision in *Lakshmanaswami Naidu* v. *Rangamma* (11). In that case the learned Judges held that a decree passed on a compromise ordering the sale of an office was void and the decree-holder was not entitled to execute the decree. The learned Judges held that the compromise decree was in no better position than an agreement of the parties, and they thought that as the agreement between the parties was void, the decree passed on such a compromise was equally void. With all respect to the learned Judges, I think they have ignored the operation of the decree as a decree. For certain purposes a compromise decree may be of the same nature as the agreement on which it is founded. Whether a particular act is legal or illegal may itself be a subject of compromise and a decree passed on such a compromise would not be void even though the agreement may be illegal [see the observations of the Judicial Committee in *Great North-West Central Railway* v. *Charlebois* (12). See also S. 331, Black on Judgments, Volume 1.] It is, however, unnecessary to pursue this matter further as in this case the judgment was rendered after trial. In this view it is unnecessary to discuss the question raised by the learned Vakil whether an alienation of a religious office is absolutely void and a custom of alienability should not be recognised by Courts, as such a custom is against public

(5) (1910) 33 Mad. 483; 6 I. C. 229.
(6) A. I. R. (1914) Cal. 281; 20 I. C. 815.
(7) (1884) 7 Mad. 341.
(8) (1869) 12 W. R. 21.
(9) U. S. Supreme Court Reports; 7 Lawyer's Edition 164.
(10) (1901) 25 Bom. 337=27 I. A. 216 (P. C.).
(11) (1903) 26 Mad. 31.
(12) (1899) A. C. 111=68 L. J. P. C 25.

policy. The weight of authority, however, seems to be against the contention [see *Mahamaya Debi* v. *Haridas Haldar* (13).]

The only other question which remains to be decided is whether the plaintiff's title to the office is extinguished by the adverse possession of the 7th defendant. Although the present suit is one for the recovery of immovable property, still if the plaintiff had no subsisting title to the office, he could not recover the properties which are the emoluments of the office. If the 7th defendant was in adverse possession of the office for over 12 years prior to the suit, plaintiff's title would have been barred notwithstanding the fact that the widow of Rajah Bhattar was alive till 1910 [*Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (2), *Lilabati Misrain* v. *Bishun Chobey* (14)]. The 7th defendant who claims to have acquired a title by adverse possession has to prove that he took possession of the office adversely to the plaintiff. There is some evidence that he along with the other co-sharers was in enjoyment of the properties attached to the office, but that is not enough. He has to prove that he was performing the duties of the office [see *Kamalathammal* v. *Krishna Pillai* (4) *Bhaiaji Thakur* v. *Jharula Das* (3)]. There is no evidence that he ever performed the duties of the office. He contends that the 6th defendant, his elder brother, did the duties of the office for himself and his brother, the 7th defendant. The 6th defendant himself who is called as a witness does not say so, nor does the 7th defendant. The only basis for this contention is a statement made by the 6th defendant that in the division of the lands belonging to Chandrasekara Bhattar a fourth share was allotted jointly to him and his brother (Exhibit II). From this Mr. Krishnaswami Aiyar wants us to infer that the duties of the office were performed by the 6th defendant not only for himself but for the 7th defendant as the joint owner of a fourth share of the office of Chandrasekara Bhattar. I am wholly unable to draw any such inference. It is further doubtful whether the possession of the 6th defendant was adverse to the plaintiff (see Exhibits R and S). I, therefore, hold that the plaintiff's claim is not barred by limitation.

I agree that the appeal must be dismissed with costs. I also agree to the order on the memorandum of objections.

S.N./R.K.

Appeal dismissed.

(13) (1915) 42 Cal. 455 = 27 I. C. 400.
(14) (1907) 6 C. L. J. 621.

A. I. R. 1916 Madras 470

BENSON AND SUNDARA AIYAR, JJ.

Kayarohana Pathan—Plaintiff—Appellant.

v.

Subbaraya Thevan and *another*—Defendants—Respondents.

Second Appeal No. 695 of 1912, decided on 28th March, 1913, against the decree of Sub-Judge, Negapatam, in A. S. No. 708 of 1910.

Hindu Law—Inheritance—Disqualification—Leprosy to be disqualification must be of sanious or ulcerous type—Curability matter of opinion—Texts relating to exclusion discussed—Quære—Whether leprosy of sanious type would be a bar to inheritance as opposed to partition in Madras.

The defendant in the case was sought to be excluded from inheriting his paternal uncle's son's estate on the ground of leprosy. The finding of the Courts below was that he was suffering from the anæsthetic form of leprosy and that it was in the medium stage. The medical opinion was that the disease was incurable :

Held, that the defendant was not debarred from inheriting and that, to be a bar, the leprosy must be of the sanious or ulcerous type. 5 B. H. C. R. 145 (A. C. J.); 1 Bom. 554; and 19 Mad. 74, Foll. [P. 471, C. 2.]

The curability or otherwise of a disease is very much a matter of opinion and what is regarded as incurable at one time may be regarded as curable at another. Many of the grounds of exclusion would not now be enforced by the Courts. 27 Mad. 591; 26 Mad. 133 and 12 B. H. C. R. 79, Ref to. [P. 472, C. 1 & 2.]

Quære.—Whether in a real case of inheritance to a deceased person, as opposed to a case of partition, even leprosy of the sanious or ulcerous type would be recognized as a bar in this Presidency at the present day. 1869 Mad. Sud. Dec. page 239; 1 Bom. 554; 19 Mad. 74; 4 C.L.J. 323; and 9 Bom. L. R. 1149, Ref. to. [P. 472, C. 2.]

The texts relating to exclusion from inheritance and the grounds therefor discussed.

C. S. Venkatachari—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—The question for decision in this second appeal is whether the defendant is disentitled to inherit his paternal uncle's son's estate by reason of his suffering from leprosy. The plaintiff is the sister's son of the deceased owner. The medical evidence is that the defendant is suffering from the anæsthetic form of leprosy and that it is in the medium stage. The District Munsif decided against the defendant on the ground that according to the opinion of the medical witness the disease was incurable. The Subordinate Judge held that the defendant was not excluded because the disease was not of the sanious or ulcerous type and was not virulent and he was not regarded as unfit for association by his castemen. The *Mitakshara*, which is the predominant authority applicable in this Presidency, does not expressly mention leprosy as a ground of exclusion from inheritance. It states "an impotent person, an out-caste, and his sons, one lame, a mad man, an idiot, a blind man and persons afflicted with an incurable disease and others (similarly disqualified) must be maintained excluding them, however, from participation. *Mitakshara*, Chapter 11, S. 10, Pl. 1—"Pl. 6 states with regard to the persons enumerated in Pl. 1 that they are debarred of their shares, if their disqualification arose before the division of the property. But one, already separated from his co-heirs, is not deprived of his allotment." Placitum provides "if the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class' shares the distribution is based." Of the Smriti writers the only one who expressly excludes a leper is Devela : Manu excludes one who is a Nirindriya, that is, devoid of an organ, after expressly mentioning eunuchs and outcastes, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him. See Buhler, Ch., IX, Sloka 201. Apastamba and Vasista do not exclude him. Narada excludes persons afflicted with a chronic or acute disease (See Sacred Books of the East, Vol. 33, page 194). Or, as otherwise translated an acute or agnozing distemper. Atrophy or pulmonary consumption is instanced as a chronic and leprosy as an acute disease in the Ratnakara. Yajnavalkya and Vishnu exclude persons suffering from an incurable disease. So far as leprosy is concerned, the later Hindu Law books generally lay down that to be a ground of exclusion it must be of the sanious or ulcerous and not of the anæsthetic type. See *Janardhan Pandurang* v. *Gopal Pandurang* (1), *Ananta* v. *Ramabai* (2) and *Rangayya Chetty* v. *Thanikachala Mudali* (3). The ancient texts apparently based the exclusion on the ground of the incapacity of the sufferer to perform the funeral and other obsequial rites of the deceased. The texts relate in terms to the right to partition on the distribution of an estate amongst several sons of a deceased owner; and the *Mitakshara* expressly provides that the share of the excluded sufferer should be restored to him if he is subsequently cured. It may be doubted whether the rule of exclusion would apply to a case of strict inheritance, as a person who is once excluded from inheritance, which consequently vests in another, is not entitled to claim it again subsequently. All the reported cases on the subject, *Muthuvelayuda Pillay* v. *Parasakthi* (4), *Ananta* v. *Ramabai* (2), *Rangayya Chetty* v. *Thanikachala Mudali* (3) and *Helan Dasi* v. *Durgadas Mundal* (5) relate to the right to partition. In *Ranchol* v. *Ajoobai* (6) the question was one of inheritance proper. The leprosy in that case was held to be of the anæsthetic type, and it was held that the sufferer was not excluded. The question whether the texts were applicable to a case of real inheritance was not raised at the arguments in the case. The precedents cited in West and Buhler's Digest of Hindu Law also refer to cases of partition. In one case, the Pandit was asked whether the nephew of a deceased person was entitled to the certificate of heirship in preference to his son who was insane. In his answer he expressly referred to the fact of the son and nephew being united in interest as the ground for holding that the nephew was entitled to preference. It cannot, however,

(1) (1868-69) 5 Bom. H. C. R. 145 (A. C. J.)
(2) (1875-77) 1 Bom. 554.
(3) (1896) 19 Mad 74.
(4) Mad. Sud. Decns. for 1860, p. 239.
(5) (1906) 4 C. L. J. 323.
(6) (1907) 9 Bom. L. R. 1149.

be denied that the texts have been applied to the right of inheritance in the case of blindness and dumbness although not in the case of leprosy. It must be noted that the ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the *Mitakshara*. The author refers to them by the expression "others similarly disqualified." How wide the reasons for exclusion were, will appear from Colebrooke's Digest, Vol. II, pages 424 to 435. Many of the grounds of exclusion would not now be enforced by the Courts, and are practically obsolete. See Mayne's Hindu Law, paragraph 592 and *Vedanayaga Mudaliar* v. *Vedammal* (7). In *Venkata Subba Row* v. *Purushottam* (8), Bhashyam Iyengar and Moore, JJ., abstained from expressing an opinion on the question whether lameness was a ground of exclusion, although a "*pangu*" is expressly named by Yajnavalkya amongst excluded persons. Sir Thomas Strange refers to the opinion of Colebrooke that all the texts of exclusion cannot be said to have been abrogated or to be obsolete although the Courts would not go into proof of several of them, such as the claimant being addicted to vice or profusion or being guilty of neglect of obsequies and duties towards ancestors. "But" Colebrooke observed "expulsion from caste, leprosy and similar diseases, natural deformity from birth resulting from an uncanonical marriage would doubtlessly now exclude, and I apprehend it would have to be so adjudged in our Adawlets." See Strange's Hindu Law, Vol. I, page 159. It is doubtful how far the injunctions contained in the books are now actually enforced in different parts of the country. In Steele's Law of Castes it is observed that the rules of exclusion are largely qualified by custom and that in seventy-two castes at Poona it was found that insanity excluded only unmarried persons and that in eighty-three castes blind persons married and having families might inherit. In *Bai Amrit* v. *Bai Manik* (9) a boy bordering on idiocy was allowed to transmit a heritable right to his widow. See West and Buhler's Digest, Introduction, page 155.

(7) (1904) 27 Mad. 591.
(8) (1903) 26 Mad. 133.
(9) (1875) 12 Bom. H. C. R. 79.

Again there is a difference of opinion amongst Hindu writers whether the disability to inherit could not be removed by the performance of expiatory ceremonies. According to some authors, expiation, though productive of spritual benefit would not in cases of major sins and serious diseases indicative of such sins, render the sufferer fit for social intercourse or to inherit. This was the view taken in Bengal Sudder Adawlat Decisions, Vol. 2, page 108 referred to in the Vyvasthachandrika, Vol. 2, Precedents page, 492. But others are of a different opinion. These considerations would have to be borne in mind if we had to pronounce a definite decision on the question whether in a case of inheritance proper leprosy of the sanious or ulcerous type would be a ground of disqualification in this Presidency at the present day, but it is not necessary to do so, as the finding is that the defendant in this case is not suffering from leprosy of that type. It is contended for the appellant that as according to the medical opinion the disease is incurable, the case is one which falls within the text of the *Mitakshara*: but the question is not whether according to modern medical opinion the disease is curable though of anæsthetic type. Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion, on which the medical profession itself might be divided. The test would, moreover, be an indefinite one for legal purpose, as what is at one time regarded as curable may at other times be regarded as incurable. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test. The result is that we must dismiss the second appeal.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 473 (1)

BENSON AND SUNDARA AIYAR, JJ.

Kocharla Seetamma—Defendant—Appellant.

v.

Pillala Venkataramanayya and *others*—Plaintiffs—Respondents.

Appeal Suit No. 211 of 1911, decided on 17th April, 1913, against the decree of Dist. Judge, Ganjam, in Original Suit No. 1 of 1907.

Transfer of Property Act (4 of 1882), S. 6 (e)—Claim for past mesne profits is only right to sue and cannot be transfered.

A claim for past mesne profits cannot be validly transferred under clause (*e*) of S. 6 of the Transfer of Property Act. 9 Cal. 695; 5 All. 207; 18 I. C. 520; Fol. *King v. Victoria Insurance Co.*, (1896) A. C. 250, ref. to. [P. 473, C. 1.]

H. Sitaramaswami—for Appellant.

P. Narayanamurthi—for Respondents.

Judgment.—We entirely agree with the findings of the learned District Judge and the reasons he has given for them. The appellant's case as to the date of Ankamma's death is entirely unsupported by any credible evidence. We dismiss the appeal with costs.

The question argued in the memorandum of objections is whether a claim for past mesne profits could be validly transferred having regard to clause (*e*) of S. 6 of the Transfer of Property Act. We are of opinion that the lower Court is right in holding that it cannot be. *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India* (1) and *Pragi Lal* v. *Fateh Chand* (2) support this view. The recent decision of this Court in *Pansulari Vencataswami* v. *Mentana Ramachandra Raju* (3), after the amendment of clause (*e*) of S. 6 of the Transfer of Property Act, is to the same effect. See also *Abu Mahomed* v. *S. C. Chunder* (4). The respondents refer to *King* v. *Victoria Insurance Co.* (5). But the case is not in point, as the right of an insurer under a contract of insurance to be subrogated to the rights and remedies of the assured cannot be regarded as arising merely from the transfer of a right of action. We are not prepared to agree that the view laid down in Warren's "Choses in Action," page 161, that a right to recover damages for an assault is assignable, correctly expresses the law applicable in this country, assuming that it does the law applicable in England. The plaintiffs are entitled to interest on the profits of each year at 6 per cent. per annum. With this slight modification we dismiss the memorandum of objections with costs.

S.N./R.K.

Memorandum of objections dismissed.

(1) (1883) 9 Cal. 695.
(2) (1883) 5 All. 207.
(3) (1913) 18 I. C 520.
(4) (1909) 36 Cal. 345; 1 I. C. 827.
(5) (1896) A. C. 250.

A. I. R. 1916 Madras 473 (2)

AYLING AND TYABJI, JJ.

Keepilacheri Parkum Cheepothi Ammad and *others*—Plaintiffs—Appellants.

v.

Vannathankandiyil Ambalathankandi Ayissa and *others*—Defendants—Respondents.

Second Appeal No. 1009 of 1914, decided on 24th September, 1915, from the decree of Tempy., Sub-Judge, Tellicherry, in Appeal Suit No. 666 of 1911.

(a) Letters Patent (Madras), S. 37—Madras High Court Rules, R. 105—Dismissal of appeal for default of paying printing fees is valid under S. 37—Rule does not contravene—Civil P. C., S. 100 or O. 41.

Rule 105 of the Appellate Side Rules of the High Court directing dismissal of an appeal for default of prosecution if any of the papers mentioned therein have not been printed owing to the appellant's failure to make the necessary deposit therefor, is covered by S. 37 of the Letters Patent and is not *ultra vires*. [P. 474, C. 1.]

The rule does not contravene the provisions of the Code or Civil Procedure by limiting the right of appeal conferred by S. 100 nor is it at variance with the provisions of O. 41 as to the manner of disposal of an appeal. [P. 474, C. 1.]

(b) Civil P. C. (5 of 1908), O. 41, R. 3—Hearing on merits cannot be insisted.

Where an appeal is liable to be dismissed on a preliminary ground, the appellant cannot demand a hearing on its merits. [P. 474, C. 2.]

B. Narasimha Rao and *T. K. Govinda Aiyar*—for Appellants.

T. R. Ramachandra Aiyar—for Respondents.

Ayling, J.—This second appeal comes before us for orders with reference to R. 105 of the Appellate Side Rules. The appellants admittedly failed to make the

necessary deposit for printing papers as required by the rules within the time allowed: and in our order on Civil Miscellaneous Petition No. 2329 of 1915 we have declined to extend the time. Under the rule, the appeal is, therefore, liable to be dismissed.

It has, however, been argued that the latter part of the rule itself (R. 105) is *ultra vires*. The rule runs thus:—

"The appeal shall be liable to be dismissed for default of prosecution, if any of the papers mentioned in this rule have not been printed owing to the appellant's failure to make the necessary deposit therefor."

The rule, as it stands, has been in force since 1905 and has frequently been enforced by dismissal of appeals. Even in 1905 it was in no sense a novel provision. A similar penal clause is found in the rules as far back as 1879, though it is omitted or modified in the rules as re-issued between 1900 and 1905. No authority whatever has been quoted in support of the contention that it is *ultra vires*, and so far as I am aware its validity has never hitherto been questioned.

It is, in my opinion, undoubtedly covered by S. 37 of the Letters Patent, which gives this Court power "to make rules and orders for the purpose of regulating all proceedings in Civil cases which may be brought before the said High Court."

Our attention was drawn to the proviso, which enacts that in making such rules and orders the High Court shall be guided as far as possible by the provisions of the Civil Procedure Code. I cannot accept this argument that the rule contravenes the provisions of the Code by limiting the right of appeal conferred by S. 100 of the Code Civil Procedure: and I do not think there is much force in the contention that it is at variance with the provisions of O. 41 (reproducing S. 541 *et seq.* of the old Code) as to the manner of disposal of an appeal. There seems to be no reason why an order of dismissal for infringement of this rule should not be covered by either R. 11 (1) or R. 16 of O. 41 of the Civil Procedure Code. Which of these would be applicable would depend on the procedure followed by the Appellate Court prior to the time of default. In the present case notice has issued under Rr. 13 and 14, respondents have been served: and appearance has been filed for two of them (respondents Nos. 3 and 4). The appeal has not been posted under R. 12 for disposal on its merits, appellant having made default in payment of printing charges while respondent was being served with notice. R. 16 would, therefore, appear to be applicable. But under either rule the dismissal would appear to be legal. Each gives appellant a right to be heard "in support of the appeal, but where the appeal is liable to be dismissed on a preliminary ground, he cannot demand a hearing on the merits of the appeal.

The penal proviso in the rule under consideration appears to be substantially identical with that embodied in the rules of the Calcutta High Court, Part II, Chapter VIII, R. 17, and Chapter IX, R. 5. The former clause (R. 17) was the subject of consideration in two cases [*Ramhari Sahu* v. *Madan Mohan Mittar* (1) and *Fatimunnissa* v. *Deoki Pershad* (2)]. The immediate question was the nature of the remedy available to an appellant whose appeal had been dismissed for default but it is to be observed that throughout the argument in each case no doubt appears to have been felt as to the validity of the rule.

In my opinion R. 105 is not *ultra vires*.

I would direct the dismissal of the appeal with costs.

Tyabji, J.—I agree.

S. N./R. K.

Appeal dismissed.

(1) (1896) 23 Cal. 339.
(2) (1897) 24 Cal. 350 (F. B.)

A. I. R. 1916 Madras 474

AYLING AND PHILLIPS, JJ.

Emperor—Appellant.

v.

Govindarajulu — Accused — Respondent.

Criminal Appeal No. 470 of 1915, decided on 29th September, 1915, against the acquittal of aforesaid accused by Third Presy. Magte., Georgetown, Madras, in Calendar Case No. 6575 of 1915.

Madras City Police Act (3 of 1885), S. 75—Existence of legal right of access is not necessary to constitute public place—Harbour premises are public places within S. 75.

A legal right of access by the public is not necessary to constitute a public place. A public place is one where the public go, no matter whether they have a right to go or not. *Reg* v. *Wellard*, (1885) 14 Q. B. D. 63; *Kitson* v. *Ashe*, (1899) 1 Q. B. 425; Foll. [P. 475, C. 2.]

The harbour premises which respectable people and other people who have business are permitted to enter, are "places of public resort" within the meaning of S. 75. [P. 475, C. 1 & 2.]

Crown Prosecutor—for the Crown.

Facts.—The accused was charged by the Police for an offence under S. 75 of the Madras City Police Act for disorderly behaviour. The Presidency Magistrate acquitted him, on the ground that the harbour is not "a place of public resort" within the meaning of S. 75 of Act III of 1888. The Government appealed against the order of acquittal.

Judgment.—The accused in this case was prosecuted for disorderly behaviour in a place of public resort (to wit, the grounds of the Madras Harbour), an offence under S. 75 of the Madras City Police Act. He has been acquitted on the ground that the harbour premises do not constitute a place of public resort.

In our opinion the Presidency Magistrate has taken too narrow a view of the law. It is true that the by-laws framed under the Port Trust Act provide for prosecution as trespassers of persons who enter on the harbour premises without having business there or with the ships lying in the harbour: and from the Magistrate's judgment it appears that such people (as he says, mainly coolies, or up-country visitors) are actually prosecuted before him. But it is perfectly clear from the statement of objects and reasons for the amended by-laws printed in G. O. No. 341, Marine, dated 22nd October 1912, that By-law 22 which provides for the exclusion of the general public, was not intended to be enforced against respectable people. The trustees say:—

"We cannot pretend to keep respectable people entirely out of our premises during working hours, simply because it would be intolerable for them to be perpetually questioned. But at least we may say that they *cannot claim admission*, and this represents the position we take up better than the old words, *will not be admitted*.

We see no reason to doubt that the by-laws have been worked in principle on these lines; and that respectable members of the public have been freely allowed to enter the harbour premises, as well as the very large number of people who have business in the harbour premises or with the shipping.

In these circumstances the harbour premises must be considered a place of public resort. A legal right of access by the public is not necessary to constitute a public place. [Vide *Reg* v. *Wellard* (1)] In the words of Grove, J.,—"A public place is one where the public go, no matter whether they have a right to go or not." [See also *Kitson* v. *Ashe* (2)].

We set aside the order of acquittal, convict the accused of the offence charged and sentence him to simple imprisonment till the rising of the Court. As the accused has been already put to considerable inconvenience by this prosecution, we impose only a nominal sentence.

S.N./R.K.

Appeal allowed: Accused convicted.

(1) (1885) 14 Q. B. D. 63=54 L. J. M. C. 14.
(2) (1899) 1 Q. B. 425=68 L. J. Q. B. 286.

A. I. R. 1916 Madras 475

SANKARAN NAIR AND OLDFIELD, JJ.

Tinnevelly Siva Devastanam Committee and *others*—Plaintiffs—Appellants.

v.

Ambalavana Pandara Sannadhi Avergal and *another*—Defendants—Respondents.

Second Appeal No. 304 of 1912, decided on 23rd February, 1915, against the decree of Sub-Judge, Tinnevelly, in O.S. No. 55 of 1910.

(a) Hindu Law—Religious endowment—Suit for declaration that temple is subject to control by committee—Right to appoint trustee must be established—Proof of Government control is not sufficient—Fact of appointment of trustee by Government would not be sufficient to prove that right.

In a suit by a Temple Committee for a declaration that the suit temple was subject to its control and should be managed by a trustee appointed by it, the plaintiff Committee must prove that the right of appointing the trustees was vested in it. Merely showing that the Government officials exercised supreme control over the management of the temple would not be enough. [P. 477, C. 1.]

In the absence of other evidence, the fact that the Government have appointed trustees is insufficient to prove the right of appointment. [P. 477, C. 1.]

(b) Religious Endowment Act (20 of 1863), S. 3—Assumption by Government of power to appoint trustees does not bring temple under S. 3.

A wrongful assumption by the Government of the power to appoint a trustee is not sufficient to bring a temple within S. 3. [P. 477, C. 1.]

(c) Religious Endowment—Styling as trustee does not prove management.

The mere fact that a man styled himself a ttustee is no evidence of management by him. [P. 477, C. 2.]

S. Srinivasa Iyengar and *A. Swaminatha Iyer*—for Appellants.

T. Rangacharior and *S. Muthia Mudaliar*—for Respondents.

Judgment.—The plaintiffs, the Siva Devasthanam Committee of Tinnevelly, appeal against the decree of the Subordinate Judge of Tinnevelly dismissing their suit brought for a declaration that the temple of *Sri* Subramaniaswami at Kurukkathurai in Tinnevelly is subject to their control and superintendence and should be managed by a trustee appointed by themselves.

The Subordinate Judge found that before the year 1842 there is no evidence that any trustee was appointed by Government, that the trusteeship was vested in the *Tiruvaduthurai Mutt* of which the defendant is the head and that the management was carried on by the agents of the *mutt* living at Isanamatam. In 1842, one Sundaralinga Thambiran and Ramalinga Pillai, who were respectively the local agent of the *Tiruvaduthurai Mutt* and his accountant, were appointed managers and the management of the temple was in their hands. In 1852 Sundaralinga Thambiran, on account of old age, gave up the management and the Pandara Sannadhi of the *mutt* appointed one Muthia Thambiran to manage the affairs of this *adhinam*. The Government officials recognized him as the manager of the temple and took a *muchilika* from him. When the Act XX of 1863 came into force, the Pandara Sannathi asserted his claim to the Dharmakarthaship, though his agents were submitting the temple accounts to the Committee then appointed under the Act from 1865 onwards. In 1885 one Saminatha Thambiran was appointed by the Pandara Sannadhi to succeed Muthia Thambiran. That appointment also was recognised by the Commitee from 1885 to 1895. Saminatha Thambiran continued in management and he submitted the usual account to the Commitee and carried on the management under the superintendence of the Committee. Saminatha Thambiran died in 1897 and Vythilinga Thambiran was appointed by the Pandara Sannadhi to manage the temple and that appointment was recognized by the Committee in 1898. No accounts were sent to the Committee after the death of Saminatha Thambiran and from that time there were disputes between the Committee and the Pandara Sannadhi. These are the facts found by the Subordinate Judge.

On appeal before us, it is contended that there is no evidence that the trusteeship was vested in the Pandara Sannadhi before the year 1842, that in 1841-42 three trustees were appointed by the Government when the Revenue Board divested themselves of the management of the temple, that Muthia Thambiran, Saminatha Thambiran and Vythialinga Thambiran were only recommended for appointment by the Pandara Sannadhi of Thiruvaduthurai but that the appointment itself was made by Government officials, that from 1864 to 1898 the management was carried on entirely under the supervision of the Committee, and that a fair inference, therefore, from the evidence is that the right of appointment of the trustees was in 1863 vested in the Government or that the appointment could be made only subject to their approval. It is argued that the temple, therefore, falls within the scope of S. 3 of Act XX of 1863, and is, therefore, subject to the control of the Committee. That the Isanamatam at Tinnevelly was entirely under the control and superintendence of the *Thiruvaduthurai Mutt* is not denied. In 1807, the *inam* register shows that it was the Kaviraj Thambiran of this *mutt* who received the money payable to this temple from the Government. His successor was one Nagalinga Thambiran, also of the Isanamatam. He was succeeded by one Namasivaya Thambiran also of the Isanamatam. The title-deeds of properties belonging to the temple stood in the names of these Thambirans. In 1841-42 the Revenue Board gave up the management of these temples which were

till then under their control and they took a *muchilika*, Exhibit B, from three persons, Sundaralinga Thambiran, his accountant, Ramalinga Pillai, and Kanthimathinatha Pillai, as the *dharmakartas* on the 1st September 1842. We are not prepared to attach much weight to acts of interference by the Revenue Officials till that time, because it appears that in the Tinnevelly District their control and interference extended "almost over everything connected with the Pagoda, from the collection of its revenues from whatever source derived and the management of its lands to the regulating of its daily usual expenses, its periodical festivals, its repairs." It appears also that the "accounts in detail, including every item of receipt and expenditure, were kept and controlled and the appointment and dismissal of the temple servants were made by the officers of Government." This appears from the Collector's letter, dated 22nd April 1842, to the Board of Revenue. Though the Government officials thus exercised supreme control over the temple management, the plaintiffs have to prove that the right of appointing trustees was vested in them. In cases that have come before this Court, *cf.* Second Appeal No. 644 of 1884, we have held that though there was evidence that the Government appointed the trustees, that is in itself insufficient to prove the right of appointment in the absence of other evidence, because, under the Common Law, the Sovereign's right to appoint trustees was recognized when there were not found persons competent to make such appointment. A wrongful assumption by the Government of the power to appoint a trustee is not sufficient to bring the temple within S. 3 of Act XX of 1863. In this case there is no evidence whatever of any intervention by Government in the appointment of a trustee before 1842 and it is matter for fair comment that in a district, where, according to the opinion of the Collector, interference was so general, there is no evidence of such interference in the matter of the appointment of the trustee. As to what took place in 1842 there is dispute between the parties. The plaintiffs have filed a *muchilika* to show that the Government appointed three trustees, Sundaralinga Thambiran of Isanamatam, his accountant, Ramalinga Pillai, and Kanthimathinatha Pillai. Kanthimathinatha Pillai was undoubtedly a stranger. His appointment, therefore, supports the contention of the plaintiffs. But it is argued on behalf of the defendant that he never acted as trustee and that the only two men who were really appointed trustees and acted as such were Sundaralinga Thambiran and Ramalinga Pillai. Kanthimathinatha Pillai died a few years after appointment. It is not suggested that in his stead any successor was appointed. When certain disputes arose after his death between Ramalinga Pillai, one of the trustees, and the other trustee in 1855, the *muchilika* under which they were acting was stated by the officials to have been executed on the 15th August, 1842 and was referred to as the "*muchilika* executed by these two persons, *viz.*, Sundaralinga Thambiran of Isanamatam *Ilaka* and Ramalinga Pillai, accountant of the said *mutt*." This was the *muchilika* submitted by the Tahsildar to the Collector and returned afterwards by the Collector to the Tahsildar. There is no suggestion of any *muchilika* like Exhibit B. When a successor was appointed in 1855, the *muchilika* that was cancelled was that of the 15th August 1842. See Exhibit V. The only evidence that has been referred to by the appellants' Pleader to prove Kanthimathinatha Pillai's management is Exhibit C. That is an order by the Collector, apparently to the Tahsildar, forwarding a petition presented by the *Darmakarta* Kanthimathinatha Pillai, etc." It is possible that this man may have styled himself *Dharmakarta* but it is not evidence of any management by him. We have also a report of a Tahsildar in 1852 (See Exhibit II) that Sundaralinga Thambiran and Ramalinga Pillai were the persons appointed for the management of the temple and that they were in management. Considering that it was the Thambirans of Isanamatam who managed the temple before 1841, and it is only those connected with the Isanamatam who have been shown to have managed the temple affairs subsequently and the other two trustees named in Exhibit B were a Thambiran and an accountant of Isanamatam and that there was a *muchilika*, dated August, 1842, recognizing these two alone as Pandara Sannadhis, we are not prepared to hold on the strength of

Exhibits B and C alone that Kanthimathimatha Pillai acted as a trustee.

The next appointment was made in 1852. Sundaralinga Thambiran and Ramalinga Pillai were managing the temple affairs till that date. Sundaralinga Thambiran desired to retire and he said that he had represented to the *Thiruvaduthurai Mutt*, * * * * * * * * to appoint a manager in his place and that the latter had appointed Muthiah Thambiran to succeed him: Sundaralinga Thambiran, therefore, prayed "that orders should be issued directing removal of his name and entry of his (Muthiah Thambiran's) name instead, and payment to him of the *paditharam*, etc., amounts." The Collector accordingly directed that a *muchilika* should be taken from Muthiah Thambiran. No *muchilika* from him is, however, produced. This was clearly no appointment by the Collector, but only a recognition of the appoinment made by the Pandara Sannadhi.

What followed next supplies still stronger evidence against the plaintiffs. Ramalinga Pillai had ceased to be an accountant in Isanamatam in 1843, but he continued to co-operate with Sundaralinga Thambiran in signing with him receipts for allowances paid by Government. When Muthiah Thambiran was appointed, the latter declined to co-operate with Ramalinga Pillai, who had ceased his connection with Isanamatam. Muthia Thambiran claimed that he alone should be recognized as manager and all payments should be made to him, as Ramalinga Pillai's name was entered in the *muchilika* on account of his being an accountant of the Isnamatam and there was another man, Subramania Pillai, who has been appointed as the accountant, who ought to take the place of Ramalinga Pillai and if the *dastik* is not to be paid to him alone, it might be paid to him and Subramania Pillai, the present accountant. Ramalinga Pillai, on the other hand, claimed to be *Dharmakarta* by virtue of his appointment by Government in 1842 and contended that he continued to be *Dharmakarta*, though he might have ceased his connection with the *mutt*. The Collector, after consideration of the *muchilikas*, directed the name of Ramalinga Pillai to be removed and entered Subramania Pillai's name instead. Ramalinga Pillai thus ceased his connection with the temple. If Ramalinga Pillai had been a trustee appointed by Government in 1842, and he derived his right independently of his connection with the Isanamatam, there was no reason to remove him. His removal can only be explained on the ground that it is only persons connected with the Isanamatam, acting under the orders of the *Thiruvaduthurai Mutt*, who had any right to manage the temple. No other explanation has been offered of this incident by the learned Pleader for the appellants. Muthiah Thambiran ceased to be the trustee of the temple in 1885. The then Pandara Sannadhi, Subramania Desikar, appointed Saminatha Thambiran in his stead and intimated the fact to the Committee. There is an endorsement on this letter by the Committee that they did not admit that the temple was attached to the *Thiruvaduthurai Mutt*. But there is no evidence to show that this opinion of the Committee was ever communicated to the Pandara Sannadhi. The probability is that no reply was sent as the Pandara Sannadhi had to write again to the Committee (Exhibit H-4) to recognize Saminatha Thambiran as *Dharmakarta*. On receipt of this letter the Committee passed the following proceedings: "At the request of the Thiruvaduthurai Pandara Sannadhi and on his responsibility Saminatha Thambiran is appointed *Dharmakarta*." Saminatha Thambiran continued in management, submitted the accounts to the Committee, and carried on the management generally under the superintendence of the Committee. He died in April, 1897.

On the 1st June, 1897 the 1st defendant, who had succeeded Subramania Desikar as the head of the *Thiruvaduthurai Mutt*, appointed Vythialinga Thambiran as the manager of the temple in the place of Saminatha Thambiran and intimated this fact to the Committee.

Thereupon, they passed proceedings that they had appointed Vythialinga Thambiran, the 2nd defendant, at the request and on the responsibility of the 1st defendant, Pandara Sannadhi.

No accounts were submitted to the Committee after Subramania Thambiran's death.

From these facts it appears clearly that persons were appointed to manage the

temple only by the Pandara Sannadhi. Those appointments were notified to Government or to the Committee. They were accepted by the Government. The Committee passed equivocal orders to the effect that they appointed persons as managers on the responsibility of the Pandara Sannadhi. Whether these proceedings were communicated to the Pandara Sannadhi, it does not appear. But there is no evidence of any assertion of their right to make the appointment themselves having been communicated to the Pandara Sannadhi. There is also evidence that on one occasion the Pandara Sannadhi removed a manager, Ramalinga Pillai, appointed by him and the Collector recognized his right of dismissal. The fact that accounts were submitted to them and the management generally carried on under their superintendence is strongly relied upon by the appellants' Pleader. But, as has been repeatedly pointed out by this Court, for many years after the passing of the Act XX of 1863, hereditary trustees also were under the impression that they had to submit their accounts to the temple Committee and carry on the management under their supervision. It does not, therefore, indicate on their part any consciousness of the right of the Committee to appoint trustees. We are not, therefore, satisfied that the right of nominating trustees to the temple was vested in the Government in 1842 or 1863 and we are not, therefore, prepared to hold that the Judge is wrong in deciding that when Act XX of 1863 was passed the temple did not fall within S. 3 of the Act. We confirm the decree and dismiss the appeal with costs

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 479

SADASIVA AIYAR AND NAPIER, JJ.

S. Ratna Naidu—Plaintiff—Appellant.

v.

P. R. Aiyanachariar and *others*—Defendants—Respondents.

Second Appeal No. 264 of 1913, decided on 16th April, 1915, against the decree of Dist., Judge, Trichinopoly, in Appeal Suit No. 489 of 1911.

Practice—Pleadings—Attestation not denied in statement but question raised in trial—Proper course is to frame issue and allow parties to adduce evidence and not to dismiss suit—Transfer of Property Act (4 of 1882), S. 59.

Where in the course of the trial and not in the pleadings a defendant raises the plea that the mortgage is invalid because the signature of the mortgagor was not attested by two witnesses as required by S. 59, the Court should not dismiss the suit for that reason. It is only upon a distinct and supplemental issue framed on the point and after giving both the parties an opportunity to adduce fresh evidence on it, that a Court should find for or against the invalidity of the document for that reason. 35 Mad. 607 (P.C.) Foll.

[P. 479, C. 2.]

M. C. Parthasaradhi Aiyangar—for Appellant.

S. Gopalaswami Aiyangar and *C. Padmanabha Aiyangar*—for Respondents.

Judgment.—We think that, on the pleadings, the question was not raised whether the document Exhibit B was invalid as a mortgage, on the ground that it was not attested by two persons who saw the executant sign the document. Taking it that it was raised by the defendants during the trial, the District Munsif ought to have framed a supplemental issue on this new question, given an opportunity to the parties to adduce evidence thereon and then decided it.

In the case of *Shamu Patter* v. *Abdul Kadir Rowthan* (1), a supplemental issue was raised by the Court (though at a late stage) and there was no contention that the plaintiff had not been given sufficient opportunity to let in evidence on the supplemental issue.

We request the lower Appellate Court to frame the necessary issue and to give a finding thereon allowing both sides to adduce fresh evidence. [We might remark that neither of the lower Courts has definitely pronounced whether it believes the 1st defendant, the plaintiff's witness No. 2 and defendant's witness No. 1 when they deny that they (plaintiff's witness No. 2 and defendant's witness No. 1) saw the 1st defendant sign the mortgage-deed.

The finding will be returned in six weeks from the date of receipt of records in the lower Appellate Court and ten days will be allowed for filing objections.

Finding.—I am asked for a finding whether Exhibit B is invalid as a mort-

(1) (1912) 35 Mad. 607=39 I. A. 220=16 I. C. 250 (P. C.).

gage on the ground that it was not attested by two persons who saw the executant sign the document?" No fresh evidence is adduced.

2. Exhibit B is a mortgage-deed by 1st defendant to Arayar Rangachariar for Rs. 950. It is attested by three persons. Only one of them says he saw 1st defendant sign it. The other two say 1st defendant said he signed it, so they attested but they did not see him sign. The Munsif, therefore, found the mortgage was not proved and plaintiff could claim no charge thereunder. It is argued now that P. W. No. 2 and P. W. No. 1 really lie when they say they did not see 1st defendant sign the document.

3. The document purports to be for Rs. 950 made up of moneys due on three prior bonds. No consideration was paid at the time. P. W. No. 3 saw 1st defendant sign it. P. W. No. 2 says he attested the document and 1st defendant executed it. But in cross-examination he says he did not see this execution by 1st defendant and says the money was borrowed in cash for a present to a dancing girl—thus contradicting the terms of the document.

4. P. W. No. 1 also attested the document, but did not see it signed by 1st defendant. He says Rs. 700 were paid in cash to 1st defendant and plaintiff lost Rs. 250 as discount. He also contradicts the terms of the document. This man was twice summoned by plaintiff and did not appear. He was finally summoned and examined by defendant, a circumstance that suggest that he really did see the signature of 1st defendant and was bought over.

5. The written statement never raised this plea that the mortgage was invalid for want of attestation and I reject it as a subsequent plea to support which the two attestors were bought over. I find that Exhibit B was duly attested and is not invalid for want of attestation by two persons who saw the executant sign it]

This case coming on for final hearing after receipt of the finding of the lower Appellate Court on the issue referred to it for trial, the Court delivered the following

Judgment.—The evidence of plaintiff's witness No. 2 in chief examination, though contradicted by him in cross-examination, must be taken to have been believed by the District Judge who finds that all three witnesses (including plaintiff's witness No. 2) were present at and saw the execution of the document.

We accept the finding and setting aside the decrees of the lower Courts, remand the suit to the District Judge for disposal of the appeal on the other questions in the case. Costs hitherto will be costs in the cause.

S. N./R. K.

Case remanded.

A. I. R. 1916 Madras 480

SRINIVASA AIYANGAR, J.

Samu Pathan – Plaintiff – Petitioner.

v.

Chidambara Odayan—Defendant—Respondent.

Civil Revn. Petn. No. 884 of 1914, decided on 5th August 1915, from the decree of Sub-Judge, Mayavaram, in Sm. C. Suit No. 1805 of 1913.

Transfer of Property Act (4 of 1882), Ss. 55 and 132—No covenant for title in assignment of mortgage debt—No suit for damages is therefore maintainable.

There is no implied covenant for title on a transfer of a mortgage-debt, as it can hardly be regarded as a transfer of ownership of immovable property,

Therefore, in such a case a suit to recover damages for an alleged breach of covenant for title is not maintainable. The cause of action for a suit for damages for breach of covenant fot title arises on the execution of the conveance.

A. V. Visvanatha Sastri for *G. S. Ramachandra Aiyar*—for Petitioner.

K. S. Jayarama Iyer—for Respondent.

Judgment.—The plaintiff obtained an assignment of a mortgage-debt from the defendant and sued the mortgagor for the mortgage amount. That suit was dismissed on the ground that the mortgagor had no title to the mortgaged properties. Why the plaintiff did not obtain a personal decree against the mortgagor is not explained. The plaintiff brought the present action in the Small Cause side of the Sub-Court, Mayavaram, to recover damages for an alleged breach of a covenant for title. The 1st Court dismissed the suit and this application is to revise the decree of the first Court. Plaintiff

contends that the mortgage is an interest in immovable property, that the transfer was a sale of immovable property and by virtue of S. 55 of the Transfer of Property Act, the defendant should be deemed to have contracted that the interest which he professed to transfer subsisted.

A charge on land is undoubtedly an interest in immovable property, and I will assume, though there is a difference of opinion on this point, that for the transfer of such a charge, the formalities required for the sale of immovable property should be complied with. See *Ramasami Pattar* v *Chinnan Asari* (1) *Subramaniam* v. *Perumal Reddi* (2) and S. 8, Transfer of Property Act, Ghose on Mortgage, page 72 (note). But I am not prepared to hold that there is an implied covenant for title on a transfer of a mortgage-debt. A transfer of a mortgage can hardly be regarded as a transfer of ownership of immoveable property. What is sold is primarily not the charge but the debt [*Subramaniam* v. *Perumal Reddi* (2)] ; and the rights of such a transferee are practically the same as those of a transferee of an actionable claim, though a mortgage debt is not an actionable claim as defined in the Transfer of Property Act. In a transfer by way of mortgage there is implied a covenant for title and the transferee of a mortgage gets the benefit of this covenant. [See S. 65, clause (*a*), of the Transfer of Property Act]. My attention has not been drawn to any case, Indian or English, in which such a covenant was implied ; on the other hand the case of *Marnham* v. *Weaver* (3) seems to assume that there is no such covenant. I agree with the lower Court that the plaintiff has no cause of action against the defendant. Further, the suit appears to be barred by limitation, as the cause of action for a suit for damages for breach of a covenant for title arises on the execution of the conveyance. As, however, the question was not argued before me, I do not desire to express any final opinion on the question.

I dismiss the petition with costs.

S. N./R. K.

Petition dismissed.

(1) (1901) 24 Mad. 449.
(2) (1895) 18 Mad. 454.
(3) (1899) 80 L. T. 412.

1916 Mad.—61 & 62

A. I. R. 1916 Madras 481

SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Namagiri Lakshmi Ammal—Defendant—Appellant.

v.

Ko. Srinivasa Aiyangar—Plaintiff—Respondent.

Second Appeal No. 297 of 1913, decided on 14th October, 1914, from the decree of Dist., Judge, Trichinopoly, in Appl. Suit No. 491 of 1911.

(a) Transfer of Property Act (4 of 1882), S. 53—Scope of S. 53—Gratutuous remission of debt due to debtor is covered by S. 53.

Under S. 53 it is not necessary that the transferor should reserve a benefit to himself, as gifts to a third party are as much voidable as other transfers. Though the section does not apply in terms, the principle on which it is based will apply to a creditor voluntarily remitting, with a view to defeat his creditors, the whole or a portion of a debt due to him.

[P. 482. C. 2.]

(b) Evidence Act (1 of 1872), S. 92 (4)—Evidence about variation in manner and amount of repayment cannot be allowed—Endorsement of satisfaction or recission of mortgage cannot be proved by oral evidence or unregistered endorsement.

S. 92, cl. 4, precludes evidence of an oral agreement to rescind a registered contract. 32 Mad. 281 ; 9 I. C. 340, ref. to. 23 Mad. 92 ; 23 Bom. 348 ; and 30 Mad. 231, dist.

[P. 483, C. 1.]

Where it is sought to prove that though the parties provided in the registered-deed for performance in a particular way, *e. g.*, by repayment of the debt in a particular manner, an agreement whereby a lesser amount was agreed to be taken in full discharge or a different period was fixed, would be a variation of the terms and would fall within S. 92. [P. 483, C. 1.]

A mortgage having been created by a registered document cannot be cancelled or rescinded either orally or by an unregistered endorsement on the mortgage-deed, reciting that the bond was cancelled and returned as the amount due was paid. 37 Cal. 589 ; 19 Mad. 288, ref. to.

[P. 482, C. 2 & P. 483 C. 1.]

T. Narasimha Aiyangar—for Appellant.

T. Rangachariar—for Respondent.

Judgment.—The 3rd defendant is the appellant. Defendants Nos. 1 and 2 are sisters, while the plaintiff is their brother and the 3rd defendant their niece. The plaintiff filed Original Suit No. 60 of 1900 against the 1st defendant and obtained a money decree, in execution of which he attached and purchased on the 11th August 1906 the morgage-debt alleged to be due by the 2nd defendant to the

1st defendant on a deed of mortgage dated the 26th November, 1890. Prior to his purchase, the 2nd defendant sold the mortgaged property to the 3rd defendant by a registered deed of sale dated the 20th June 1901; the deed of mortgage, with an endorsement that the amount due on it had been paid, was given to the purchaser. The suit out of which this second appeal arises was filed by the plaintiff as purchaser of the mortgage-debt for the recovery of the amout due on the ground that the mortgage was not discharged and that the sale to the 3rd defendant was a fraudulent transaction entered into with the object of defrauding him. The 3rd defendant pleaded *inter alia* that the sale to her was *bona fide* and for consideration and that the mortgage was discharged by payments made by the 2nd defendant to the 1st defendant out of moneys paid by the 3rd defendant.

The District Munsif disbelieved the evidence of discharge and held that the amount due on the mortgage was not paid. On appeal the District Judge held that it was proved to the extent of Rs. 215, and modified the decree of the District Munsif. The 3rd defendant files this second appeal against that part of the decree as in favour of the plaintiff and the plaintiff has filed a memorandum of objections against that part of the decree which modified the decree of the District Munsif.

The only issue raised on this part of the case was issue No. 3 which runs as follows:—"Was the plaint debt paid up as alleged by the 3rd defendant?" Treating the case as one of discharge, pure and simple, it is difficult to see how we can in second appeal disturb the findings of fact.

It is argued by the appellant's Vakil that as it was open to the mortgagee to remit the whole or any part of the mortgage debt, as the mortgagor and mortgagee agreed to treat the mortgage as discharged long prior to the attachment and purchase by the plaintiff and as the property was sold free from all encumbrances to the 3rd defendant, it was not open to the plaintiff to treat the mortgage as subsisting. It is also argued that S. 53 of the Transfer of Property Act has no application as there is no transfer of any immovable property, but only the relinquishment of a debt without any benefit having been reserved for the transferor.

The endorsement, Exhibit I, on the deed of mortgage (Exhibit A) runs as follows: "1901 May 26, Towards principal and interest on this bond the amount received previously in several instalments is Rs. 870. The amount received in cash to-day is Rs. 215. Total Rs. 1,085. As this sum of Rs. 1,085 has been paid, this bond has been cancelled and returned." The mortgage, therefore, was alleged to have been discharged by payments made from time to time amounting to Rs. 870 and a payment of Rs. 215 made on the date of the endorsement. Both Courts have found that Rs 870 was not paid and having regard to the relationship between the defendants and the fact that the plaintiff had obtained a money decree against the 1st defendant shortly before the endorsement and sale to the 3rd defendant, there can be no little doubt that the object of the defendants was to prevent the plaintiff from attaching the mortgage debt. The effect of a creditor voluntarily remitting the whole or a portion of a debt will be to put it out of the reach of his creditor just as much as a gift of the debt to a third person. In either case there is no consideration for the transaction and though S. 53 of the Transfer of Property Act will not apply in terms, the principle on which it is based will apply. It is not necessary under S. 53 that the transferor should reserve a benefit to himself, as gifts to a third party are as much voidable as other transfers. Supposing that the only property a person has is a large sum due to him from a relation of his and that he to defeat his creditors, remits the debt, is there any principle on which the case can be distinguished from one where he makes a gift of the debt to a third person? We think not. No authority has been cited for such a distinction being drawn, and it would open a wide door to fraud if the remission of a debt is placed on a different footing from a transfer.

Even assuming that the parties agreed to receive Rs. 215 in full settlement of the mortgage-debt and that the transaction was *bona fide*, the mortgage having been created by a registered document, it cannot be cancelled or rescinded either

orally or by an unregistered document. Exhibit I, the endorsement on the mortgage bond, was cancelled and returned as the amount due was paid. It, therefore, falls under S. 17, clause (*n*), of the Registration Act. *Hari Narain Banerjee* v. *Shama Sundari Dasi* (1) and *Uppalakandi Kunhi Kutti* v. *Kunnam Mithal Kottaprath* (2) were cases where the endorsement of receipt did not purport to extinguish the mortgage. Exhibit I cannot, therefore, be received in evidence to prove discharge. Nor is oral evidence admissible to show cancellation. In *Srinivasaswami Aiyangar* v. *Athmarama Aiyar* (3) it was held that S. 92, clause 4, of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract. This case was followed in *Iyetaly Surayya* v. *Nalamilli Venkanna* (4). It has, no doubt, been held in *Appamma Nayuralu* v. *Ramanna* (5) that an instrument which purports to extinguish a mortgage might even if unregistered, be received in evidence of payment and that oral evidence can be admitted in proof of payment, even if the receipt was inadmissible for want of registration. A similar view was also taken in *Trimbak Gangadhar Ranade* v. *Bhagwandas Mulchand* (6), *Kattika Bapanamma* v. *Kattika Kishnamma* (7). In these cases the question was one of discharge by payment. No terms were sought to be varied, but it was sought to prove that the debt was extinguished by payment, that is, that the contract was fulfilled in the manner specified in the registered deed of mortgage. Where however it is sought to prove that though the parties provided in the registered mortgage for performance in a particular way, *e. g.*, by repayment of the debt in a particular manner, an agreement whereby a lesser amount was agreed to be taken in full discharge or a different period was fixed, would be a variation of the terms and would fall within S. 92.

The second appeal fails and is dismissed with costs. The memorandum of objections is also dismissed with costs, as it does not raise any question of law.

S. N./R. K.

Appeal dismissed.

(1) (1910) 37 Cal. 589 ; 6 I. C. 159.
(2) (1896) 19 Mad. 288.
(3) (1909) 32 Mad. 281 ; 2 I. C. 612.
(4) (1911) 9 I. C. 340.
(5) (1900) 23 Mad. 92.
(6) (1899) 23 Bom. 348.
(7) (1907) 30 Mad. 231.

A. I. R. 1916 Madras 483

AYLING AND TYABJI, JJ.

Sankar Rangayya and *another*—Complainants.

v.

Sankar Ramayya and *another*—Accused.

Criminal Revn. Cases Nos. 3 and 28 of 1915, Criminal Revn. Petns. Nos. 1 and 24 of 1915, and Criminal Misc. Petns. Nos. 186 and 187 of 1915, decided on 9th August, 1915, from the order of Joint Mag., Bezwada, in Calendar Case Nos. 77 and 84 of 1914 and 118 and 119 of 1914.

Criminal P. C. (5 of 1898), Ss. 345 and 439—S. 345 is exhaustive—No compounding in revision—Order of composition is not incidental order under Criminal P. C., S. 423 (1).

S. 345 is exhaustive of the circumstances and conditions under which composition can be effected. [P. 485, C. 1.]

An order allowing composition of an offence is not an incidental order within the meaning of clause (*d*) of S. 423. 32 All. 153; diss. from. [P. 485, C. 1.]

An offence cannot be allowed to be compounded when the case comes before the High Court in revision. [P. 485, C. 1.]

T. Ramachandra Row and *Ganti Venkataramiah*—for Petitioners.

Nugent Grant, Acting Public Prosecutor—for the Government.

ORDER.

Tyabji, J.—The first point involved in this revision case is, whether the desire of the parties to compound the offence of causing grievous hurt punishable under S. 325 of the Indian Penal Code can affect our decision. The point arises in a case where two brothers brought a charge and counter-charge against each other for causing grievous hurt and rioting and each of them was sentenced by the Joint Magistrate to one month's rigorous imprisonment.

From these sentences they could not appeal, but they have applied in revision and are now desirous of compounding.

The composition of offences is dealt with in S. 345 of the Criminal Procedure Code.

Sub-S. (1) specifies the offences which may be compounded without leave of Court by the injured person. It contains no reference to the stage at which the proceedings may lie.

Sub-S. (2) provides that the offence of causing grievous hurt may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

Sub-Ss. (3) and (4) extend the sphere of composition by permitting it : (*a*) in the cases of abetments of and attempts to commit the offences that may be compounded and (*b*) by permitting guardians of minors, etc., to compound.

Sub-S. (5) refers to cases where a person has been committed to trial or where he has been convicted and he has appealed, in either of which cases it is provided that no composition for the offence shall be allowed without the leave of the Court concerned.

Sub-S. (6) gives to a composition the effect of an acquittal.

Sub-S. (7) disallows composition except as provided by the section.

The section, therefore, contains provisions with regard to (*a*) the persons who may compound ; (*b*) the nature of the offences that may be compounded ; (*c*) the stage of the criminal proceedings at which the composition is sought to be made ; (*d*) it also provides that in regard to some offences the mere consent of the injured person shall not suffice for composition : he must obtain the permission of the Court, the Courts being specified whose permission to compound has to be obtained.

Sub-S. (7) must, therefore, be taken to mean that no offence shall be compounded except where the provisions of S. 345 are satisfied as to each of these four matters.

The section mentions the Court before which the prosecution is pending, to which the accused is committed for trial and before which an appeal is pending. There is no reference to the High Court in its revisional powers. Conversely it is noteworthy that S. 439 (which defines the powers and functions of the High Court in revision) does not refer to S. 345.

It would, therefore, seem that if an offence were allowed to be compounded when the matter is pending before the High Court in revision, it could not be said that the composition was as provided by S. 345 in two respects (1) as to the stage of the proceedings, (2) as to the Court which, it is provided by the section, must give leave. It follows that the offence cannot now be compounded.

It was argued before us that we are empowered (sitting in revision) to allow the composition to be made by reason of S. 423 (1) (*d*) read with S, 439 (1). For this argument it is contended that the giving of leave to compound is merely a consequential or incidental order, a contention that was accepted in *Ram Piyari* v. *Emperor* (1), but rejected in *Ram Chandra* v. *Emperor* (2). Knox, J., who decided the latter case sitting alone, was a party to the earlier decision also but his attention was not drawn to it and he does not notice it.

In connection with this argument I observe that the Code in no place specifically empowers any Court to give permission to compound; nowhere is there any special provision conferring distinct powers to sanction compositions. In S. 345 (2) the permission of the Court is referred to as a condition precedent to the act of the parties having any effect ; and in S. 345 (5) the absence of such permission is mentioned as depriving the composition of any effect ; but in each case it is assumed that the Court has power to give permission provided there is any occasion for granting permission.

The point of view from which the subsections are drafted is, however, that it is the injured person who has to be empowered to compromise and the difficulty in the way of compromise in revision is, in my opinion, not so much that the Revision Court has not been specifically authorised to grant permission, but that the parties are not allowed to compound except at the stages when the prosecution is pending, or the accused has been committed for trial, or an appeal is being heard from a conviction. The absence of any power being given to the injured person to compromise when matters are before the Revision Court is fatal by reason of S. 345 (7).

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(1) (1910) 32 All. 153; 5 I. C. 696.
(2) A. I. R. (1915) All. 8=28 I. C. 103=37 All. 127.

In my opinion, therefore, the offence cannot be compounded at the present stage.

Ayling, J.—I have had the advantage of perusing the judgment of my learned brother, and concur in the conclusion at which he has arrived on the preliminary question for our decision.

In my opinion S. 345, Criminal Procedure Code, is exhaustive of the circumstances and conditions under which composition can be effected. No other meaning can be given to clause (7). With great respect to the learned Judges who decided *Ram Piyari* v. *Emperor* (1), I cannot see how an order permitting composition can be treated as an "incidental order" within the meaning of clause (*d*) of S. 423, Criminal Procedure Code and I do not think that section confers on an Appellate Court any powers relating to composition independent of S. 345.

By the Court.—Dealing with the revision petitions on their merits we see no reason to interfere with the convictions. As regards sentences, the Public Prosecutor represents that in view of the family nature of the quarrel and the other circumstances of the case, it is not necessary to send the petitioners (who are now on bail) back to prison. We are disposed to take the same view, and we reduce the sentences in each case to the terms of imprisonment already undergone by the petitioners. The bail bonds are discharged.

S. N./R.K.

Convictions upheld ; Sentence reduced.

A. I. R. 1916 Madras 485

Full Bench.

WALLIS, OFFG. C. J., AND AYLING AND SESHAGIRI AIYAR, JJ.

Vellore Taluq Board—Petitioner—Appellant.

v.

Gopalasami Naidu—Respondent.

Letters Patent Appeal No. 37 of 1914 decided on 24th September, 1914, from the order of Sadasiva Aiyar, J., in Civil Revn. Petn. No. 596 of 1909 ; reported in 21 I. C. 759.

Contract Act (9 of 1872), S. 74—Where deposit is agreed to be forfeited on breach of contract, if actual damage is claimed the deposited amount must be deducted.

Where a clause is entered in a contract providing for the forfeiture of a deposit made by the contractor, and the person for whose benefit the clause is entered in the contract does not content himself with retaining the deposit as a forfeiture but sues for actual loss incurred by him through the default of the other party, on the ground that the deposit amount is insufficient to cover such a loss or on the ground that the contract provides for both the forfeiture of the deposit and also for the right to recover the loss, *he cannot recover more than the difference between the loss incurred by him and the deposit money.*

Ockenden v. *Henley*, (1858) E. B. & E 485 ; *Essex* v. *Daniell*, 38 L. T. 476 ; *Howe* v. *Smith*, 27 Ch. D. 89 ; *Shuttleworth* v. *Clews*, (1910) 1 Ch. 176 ; Foll. [P. 485, C. 2 & P. 486, C. 1.]

S. Varadachariar for *L. A. Govinda Raghava Iyer*—for Appellant.

C. R. Subramania Aiyar—for Respondent.

Facts.—The facts of the case appear fully from the judgments of Spencer and Sadasiva Iyer, JJ., reported in 21 Ind. Case. 759. The appellant was the President of the Taluq Board of Vellore. The respondent was a contractor under the said Board of the right to collect market fees at the weekly fairs held at Karadigudi. As an earnest of his intention to perform the contract, he deposited a sum of Rs. 36-2-8, being two months' rent in advance. In case of default he agreed, "not only shall (I the defaulter) be deprived of the lease for the remaining months, but there shall be a re-sale at my risk and any loss resulting therefrom shall be made good from the movable or immovable properties belonging to me, and I shall also forfeit the aforesaid deposit of Rs. 36-2-8 paid by me." He did make default in the regular payment of the monthly rents on the due dates, and acting on the terms of the contract, the Taluq Board re-sold the right at his risk and sued to enforce the contract. The District Munsif before whom the suit was brought allowed the plaintiff's claim for loss less the deposit amount. On revision by the Taluq Board Spencer, J., found that the suit was to enforce two of the stipulations in the contract, *viz* , (1) "that any loss resulting from a re-sale held in consequence of the defendant's default should be recovered from his properties, (2) the defendant should forfeit his deposit of Rs. 36-2-8 ", and held that the person suffering loss on default is entitled to recover the actual loss over and above

the amount of deposit forfeited, while Sadasiva Aiyar, J., found that the suit was not to enforce both the stipulations in the contract referred to above but to enforce only the first of those stipulations, the plaintiff Board having, before bringing the suit, treated the deposit of Rs. 36-2-8, which was with it as already forfeited, and held that plaintiff could not recover more than the difference between the loss incurred by him and the deposit money. In the result the petition was dismissed and the plaintiff Board appealed under clause 15, Letters Patent.

Judgment.—We think the case is covered by the authority of *Ockenden* v. *Henley* (1), which was distinguished in *Essex* v. *Daniell* (2), and referred to with approval by Fry, J., in *Howe* v. *Smith* (3) and was apparently followed by Joyce, J., in the most recent case of *Shuttleworth* v. *Clews* (4).

We accordingly agree with Sadasiva Aiyar, J., and dismiss the appeal with costs.

S.N./R. K.

Appeal dismissed.

(1) (1858) E. B. & E. 485.
(2) (1878) 38 L. T. 476.
(3) (1884) 27 Ch. D. 89.
(4) (1910) 1 Ch. 176.

A. I. R. 1916 Madras 486

SADASIVA AIYAR, J.

Tirumalanadham Surayya—Plaintiff—Petitioner.

v.

Tirumalandham Bapirazu and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 319 of 1914, decided on 1st October, 1915, from the judgment and decree of Dist. Munsif, Rajahmundry, in Sm. C. Suit No. 1032 of 1913.

(a) Limitation Act (9 of 1908), Arts. 49 and 115—Suit for breach of contract of returning similar tiles on due date or in alternative same tiles though used, after 6 years is barred though demand made just before suit—Art. 115 and not Art. 49 applied.

Where the contract between the parties was that to discharge the loan of 30,000 burnt tiles made to the defendants by the plaintiff in May, 1905, the same number of properly burnt tiles should be returned to the plaintiff on demand after 20th January, 1906, and if the tiles offered in satisfaction were not approved by the plaintiff and his four *panchayatdars* the identical tiles lent, though they had been used in covering a temple roof, should be brought down from that roof and returned to the plaintiff, and where the plaintiff demanded the return of the tiles about six years after the loan and on their refusal, brought a suit for damages for breach of contract in 1913.

Held, that the contract was broken when the defendants failed to offer to deliver 30,000 properly burnt tiles on the 21st January, 1906, on which date the right of the plaintiff to make a demand on the defendants arose, and not on the date on which performance was actually demanded by the plaintiff and refused by the defendants; that Art. 115 and not Art. 49 of the Limitation Act. 1908, applied to the case. [P. 487, C. 1.]

(b) Limitation Act (9 of 1908), Art. 115—Not actual demand but failure to perform on stipulated date gives the starting point even though compensation is payable on demand—Meaning of 'on demand' is forthwith.

An actual demand is not necessary to establish a starting point of limitation under Article 115 of the Limitation Act, even if the document makes the compensation payable on demand. [P. 487, C. 2.]

"On demand" is a technical expression meaning immediately or forthwith. 20 Mad. 245 and 21 Mad. 139, Ref. to. [P. 487, C. 1.]

B. Narasimha Row—for Petitioner.

P. Chenchiah for *T. Prakasam* and *S. N. Rao*—for Respondents.

Facts.—The plaintiff brought this suit to recover Rs. 60, being the value of tiles, or 30,000 tiles due under a letter executed by 1st defendant and father of defendants Nos. 2 to 4 in his favour, dated 22nd May, 1905. The letter ran as follows:—

"As there are no ready-made tiles available for the temple of the village deity, called Vemulamma, in the village of Madburapudis, the (number of) tiles borrowed from you is thirty thousand. These thirty thousand titles, any one of us will deliver to you on demand after Pushya B 10 of the year Visvavasu (20th January, 1906).

If you do not approve of the burning, etc., of the said tiles, and if any four respectable men you like, do not also approve of it, then we shall have your own tiles brought down from the roof of the temple and delivered to you. We shall have the delivery of the tiles to be made to you at your house."

The suit was brought six years after the tiles were lent and it was alleged that the plaintiff demanded the return of the tiles three months before the suit. The plaintiff contended that the cause of

action arose on the date of actual demand and refusal and consequently he was in time. The defendants contended that the cause of action arose on 21st January, 1906, when the plaintiff became entitled to performance under the letter and the suit, having been brought more than three years after that date, was barred. The District Munsif upheld the contention of the defendants and dismissed the suit.

Judgment. I am satisfied from a perusal of Exhibit A that the contract between the parties was, that to discharge the loan of 30,000 burnt tiles made to the defendants by the plaintiff in May 1905, the same number of properly-burnt tiles (not the identical 30,000 tiles after they had been, as intended, used by the 1st defendant and the father of defendants Nos. 2 to 4 in covering the temple roof, but the same number of burnt tiles) should be returned to the plaintiff on demand after 20th January, 1906 and if the tiles offered in satisfaction are not approved by the plaintiff and his four *panchayatdars* the identical tiles lent, though they had been used in covering the temple roof, should be brought down from that roof and returned to the plaintiff. I think this contract was broken when the defendants failed to offer to deliver thirty thousand properly-burnt tiles on the 21st January, 1906, the plaintiff's right to make a demand on the defendants for satisfaction of his claim under Exhibit A having arisen on the said 21st January 1906. That an actual demand is not necessary to establish a starting point under Article 132 of the Limitation Act, even though the document makes the money payable "on demand," has been established by the decisions of this Court. See *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1) and *Perianna Gounden* v. *Muthuvira Gounden* (2).

As is said in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1), "on demand" is a technical expression meaning "immediately or forthwith." I cannot admit the petitioner's learned Vakil's contention that Article 49 applies to this suit brought for damages for breach of contract (based on a contract of loan of tiles), this suit not being a suit in tort for the wrongful taking, injuring or wrongful detention of specific movable property or for the recovery of specific movables.

Article 115 seems to me to clearly apply to this case, and not Article 120 (which was relied on by Mr. Chenciah for the respondents and which is a much more general Article than 115 and which should be relied on only in the last resort.). The suit was clearly barred when it was brought in 1913, and this revision petition is, therefore, dismissed with costs.

S.N./R.K.

Petition dismissed.

(1) (1897) 20 Mad. 245
(2) (1898) 21 Mad. 139

A. I. R. 1916 Madras 487

SADASIVA AIYAR AND NAPIER, JJ.

T. R. M. A. R. R. M. Arunachalam Chetty and *another*—Defendants—Appellants.

v.

K. N. Kothandapani Pillai—Plaintiff—Respondent.

Second Appeal No. 22 of 1913, decided on 2nd December, 1914, from the decree of Bakewell, J., dated 7th January, 1913.

(a) Madras High Court Original Side Rules, R. 48—Leave to file written statement after date fixed must be obtained—It can be refused—Leave can be obtained afterwards.

Under R. 48 of the Original Side Rules a defendant is not entitled, until the leave of the Court is obtained, to put in a written statement after the date fixed in the summons served on him and the Judge has a discretion to grant or refuse such leave. [P. 488, C. 1.]

Collins v. *Vestry of Paddington*, (1880) 5 Q. B. D. 368, Dist.

If, however, a written statement is filed after the due date without getting the leave of the Court, but an extension of time is afterwards applied for and obtained, the pleading already put in is not a nullity but can be looked into and accepted. [P. 488, C. 1 & 2.]

Graves v. *Terry*, (1882) 9 Q. B. D. 170; expl. *Gill* v. *Woodfin*, (1884) 25 Ch. D. 707; and *Gibbings* v. *Strong*, (1884) 26 Ch. D. 66; not foll.

(b) Civil P. C. (1908), O. 9, R. 13—*Ex parte* decree will not be set aside on the allegation that document sued upon is not proved when the allegation is refuted.

An *ex parte* decree will not be set aside merely for the reason that it does not appear from the record, *viz.*, (the Judge's notes) that the promissory note in suit had been properly proved, especially when the point had not been taken in the memorandum of appeal and where as a

matter of fact it appeared from the statement of the Vakil for the respondent-plaintiff that an attestor of the note had been examined before the trial Judge. [P. 448, C. 2.]

G. Krishnaswami Aiyar-for Appellants.

V. Viswanatha Sastry—for Respondent.

Facts.—The suit was upon a promissory note. After successfully evading several summonses taken out for his appearance, the defendant was eventually served personally. He then put forward an untenable allegation that he was a lunatic and several months after the service of summons on him, he applied under R. 48 of the Original Side Rules for leave to file his written statement. In support of his application he filed an affidavit wherein he stated that he asked a third party to look after the litigation and that he had played him false. Bakewell, J., who heard the application refused the leave sought and decreed the suit. The defendant then preferred this appeal.

Judgment.—R. 48 of the Original Side Rules clearly implies that until the leave of the Court is obtained, a defendant is not entitled to put in a statement of defence after the date fixed in the summons served on him to file such statement. It further implies that the Judge has a discretion to grant such leave and is not bound always to grant such leave. The case in *Collins* v. *Vestry of Paddington* (1), quoted by the appellant's learned Vakil, merely decides that when applications for extension of time are made before judgment, "reasonable relaxation" should be freely granted "whenever an unintentional mistake has been committed," and not that the Judge has no discretion in the matter of granting an extension of time. The decision in *Gill* v. *Woodfin* (2) professes to follow the decision in *Graves* v. *Terry* (3). The latter case only dicided that the contention that a pleading paper not filed within the time allowed by the rules was a *nullity*, is not sustainable simply because an extension of time has not been obtained from the Court.

We take it that this means that if an extention is applied for and obtained, afterwards the pleading already put in might be looked into and accepted and need not be treated as a nullity and a fresh statement called for.

It must be admitted, however, that there are observations in *Gill* v. *Woodfin* (2) and *Gibbings* v. *Strong* (4), which seem to go as far as is contended for by the appellant, but with great respect we differ from those observations.

In the present case, the learned Judge clearly held that the defendant deliberately delayed putting in the statement of his defence till several months after the due date, and after evading the several sommonses taken out for his appearance and after putting forward an untenable allegation that he was a lunatic. We are also not satisfied that the allegations in his affidavit that he asked somebody else to look after this litigation and that that man played him false, are at all reliable. We are, therefore, not prepared to interfere with the order of the learned Judge, who exercised the discretion vested in him by refusing to allow to the defendant leave to put in his statement of defence long after the due date.

It is next contended that the learned Judge in passing the *ex parte* decree in the plaintiff's favour failed to consider that the promissory note sued on had not been proved by any evidence found on the record. But this is not one of the grounds taken in the memorandum of appeal and as we are not bound to listen to it, we are not inclined to allow it to be argued *in the circumstances of this case*, especially as we are told by Mr. Visvanatha Sastry, the Vakil for the respondant, that one Singaravelu Pillay (an attestor of the promissory note) *was* examined by him before the learned Judge and did give evidence in proof of the promissory note, though his evidence does not appear among the Judge's notes.

We dismiss the appeal with costs.

S. N./R. K.

Appeal dismissed.

(1) (1880) 5 Q. B. D. 368=49 L. J. Q. B. 264.
(2) (1884) 25 Ch. D. 707=53 L. J. Ch. 617.
(3) (1882) 9 Q. B. D. 170=51 L. J. Q. B. 464.
(4) (1884) 26 Ch. D. 66=50 L. T. 578.

A. I. R. 1916 Madras 489

AYLING AND TYABJI, JJ.

In re Mandru Gadaba—Prisoner—Appellant.

Criminal Appeal No. 286 of 1914, and Criminal Rev. Case No. 369 of 1914, decided on 17th August, 1914, against the order of Agent of Governor, Vizagapatam, in Case No. 12 of 1914.

Penal Code (45 of 1860), S. 86—(Per Ayling, J.)—Ordinary drunkenness makes no difference in the knowledge of consequence of act—(Per Tyabji, J.)—Intoxicated person cannot be presumed to have same intent as when sober.

Per *Ayling, J.*—Under S. 86 ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. [P. 489, C. 1 & 2.]

Per *Tyabji, J.*—S. 86 does not lay down that an intoxicated person shall be dealt with as if he had the same intent as he would have had if he had not been intoxicated. [P. 490, C. 1.]

K. Govinda Marar—for Prisoner.

Nugent Grant—for Public Prosecutor—for the Crown.

Ayling, J.—It is clearly proved that the accused in this case hacked deceased Dinni to death with a *tangi*. The lower Court convicted him of culpable homicide not amounting to murder. Against this conviction he appeals, and at the same time the case has been taken up by this Court in revision and the accused has been called on to show cause why the conviction should not be altered to one under S. 302 of the Indian Penal Code and the sentence enhanced.

I have no hesitation whatever in rejecting the appeal, as the evidence leaves no doubt that the deceased was killed by the accused and by no one else.

As regards the nature of the offence it seems to me that it certainly amounts to murder. The nature of the wounds and of the weapon used are such that a sober man would undoubtedly be presumed to know that the wounds were likely to prove fatal. S. 86 of the Indian Penal Code makes it clear that ordinary drunkenness (appellant is said to have been drunk) makes no difference to the knowledge with which a man is credited. If the accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. The offence, therefore, comes within the substantive portion of S. 300 of the Indian Penal Code. It is pleaded on behalf of the accused that it also comes within exception 4 to the same section. This is for him to show. It may be conceded that the offence was committed "without *premeditation* in a sudden fight in the heat of passion upon a sudden quarrel," but the accused has also to show that he took no undue advantage and did not act in a cruel or unusual manner. The evidence makes it perfectly clear that the deceased had only a small stick like a cane, while the accused fell upon him with a *tangi*, a sort of battle-axe ordinarily carried by these hill-men. To my mind it is clear that in so doing the accused did take any undue advantage and acted in a cruel and unusual manner, and that he is precluded from availing himself of this exception. My learned brother, however, takes a different view: and while I myself, with great deference think that the accused should have been charged with and convicted of murder, I am not sure that the case is one in which the interests of justice imperatively require the interference of this Court in revision.

I would, therefore, simply confirm the conviction and the sentence passed by the lower Court and dismiss the appeal.

Tyabji, J.—The accused was charged under S. 304 of the Indian Penal Code of having committed culpable homicide not amounting to murder, and sentenced to ten year's rigorous imprisonment.

The facts proved, at the trial, were that the accused and the deceased were drunk, and quarrelled. Then the accused struck the deceased 11 times with his *tangi* which severed the arteries, and caused the death of the deceased. The Sessions Judge found the accused guilty, and sentenced him to ten year's rigorous imprisonment.

I agree with my learned brother that the appeal should be dismissed for the reasons mentioned by him.

With reference to the revisional proceedings, the question is whether the accused was guilty not only of culpable homicide but of murder, and whether we ought to convict him under S. 302 instead

of S. 304 of the Indian Penal Code, enhancing the sentence.

It is true that S. 86 of the Indian Penal Code lays down that in certain cases an intoxicated person shall be liable to be dealt with "as if he had the same knowledge as he would have had if he had not been intoxicated." But it does not provide that the intoxicated person shall be dealt with as if he had the same *intent*. It seems to me that the word "intent" was advisedly omitted, as "knowledge" and "intent" are both referred to in the earlier portion of the section. On the other hand, it must be noted that S. 86 expressly deals with "cases where an act [is] done.....with a particular knowledge or intent," It may, therefore, be (as was contended by the Public Prosecutor) that S. 86 implies that intent should be inferred from knowledge, though knowledge alone is expressly imputed to the intoxicated person. The section should, in my opinion, be construed strictly. But it is unnecessary to express any final opinion on this aspect of the case and on the effect of the necessary inferences to be drawn from the knowledge which S. 86 imputes to an accused person. For even taking the restricted interpretation of S. 86 that is contended for as being the correct one on behalf of the accused, he comes within the "*fourthly*" mentioned case in S. 300.

The question then is whether the facts entitle the accused to the benefit of the fourth exception to S. 300. It is clear on the facts, as they appear from the evidence, that the case does come within the exception unless it is shown that the offender took undue advantage or acted in a cruel or unusual manner. It is in this connection that the Public Prosecutor has not satisfied my doubts. The accused was not put to his trial under this section. He would, therefore, not be concerned with proving that which would make exception 4 to S. 300 available to him. The question, therefore, of the onus of proof as laid down in S. 105 of the Indian Evidence Act cannot in fairness be pressed against the accused. Apart from it, I am not satisfied on the facts, as they now appear on the evidence, that the accused took any undue advantage, or acted in a cruel or unusual manner. For in this connection, I do not think that S. 86 requires us to disregard the fact that accused was intoxicated; S. 86 is a section which creates an artificial rule for the effect of evidence and the significance of facts. The section must be read as it is. It does not provide that in all criminal matters, and for deciding all questions under the Indian Penal Code "a person who is intoxicated shall be dealt with in the same way as if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will." I therefore, think that it is very doubtful, even if the charge had been under S. 302, and the case had to be decided on the materials before us, whether the accused should not be considered to have come under exception 4 to S. 300. But remembering that the trial was under S. 304 and not under S. 302, I feel no doubt in giving expression to the opinion that the conviction ought not now to be altered to one under S. 302 and that the sentence ought not to be enhanced.

My learned brother's view is different from mine on the question involved in the revision case; and I need hardly say that I cannot feel entire confidence in the correctness of my opinion on learning of his views. But whether my views are right or wrong I feel no doubt as to them. I am clearly of opinion that we should not interfere in revision and that the sentence should be confirmed.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 490

AYLING AND PHILLIPS, JJ.

A.L.A.R. Arunachelum Chetty —Plaintiff—Appellant.

v.

Syyad Ahamed Ambalam and *others*—Defendants—Respondents.

Second Appeals Nos. 1082 to 1092, 1862 to 1868 and 2052 of 1913, decided on 22nd October, 1915, from the decrees of Dist. Judge, Ramnad, in Appeal Suits Nos. 37, 58, 62, 82, 88, 105, 112, 116, 306, 309 and 311 of 1912, 628, 632, 647, 655, 660, 663 and 667 of 1911 and 130 of 1913.

Madras Estates Land Act (1 of 1908), S. 13 (3)—Contract to pay extra charge for vanpayir cannot be presumed from long payment.

It cannot be laid down as a general rule that in all cases where there has been a long-continued course of payment of an extra charge for *vanpayir*, a contract to pay it must be presumed. 27 I. C. 688; expl. 28 Mad. 444, con; 35 Mad. 134 and 28 I. C. 492, Foll. [P. 491, C. 2.]

S. Sundaraja Iyengar—for Appellant.

A. Krishnaswami Iyer and *T. Arumainatham Pillai* - for Respondents.

Judgment.—The first point argued before us, relates to the landlord's claim to an extra charge for "*vanpayir*" (*i.e.*,) garden crops raised on dry lands by means of wells dug at the tenants' expense. Both the lower Courts have held that this charge is illegal.

There is no dispute that the wells in question were dug at the tenants' expense; nor, on the other hand, that in spite of this fact, the extra charge has been levied for many years—the Sub-Collector says, "from time immemorial," which we must take to mean 'ever since the wells were dug, and their water used for raising the garden crops.' But there does not appear to be any finding as to the length of time during which payment has been made in any particular case.

The respondents rely on S. 13 (3) of the Madras Estates Land Act to support the decision of the lower Courts. The appellant contends that the charge is made in pursuance of a contract prior to the introduction of the Act: and that, as held in *Venkata Perumal Raju* v. *Ramudu* (1), such a contract is enforceable in spite of the section.

This theory of a *contract* validating the charge, has been set up for the first time in the hearing of these second appeals. In both the lower Courts, and even in the memorandum of second appeals, it was sought to support the charge on the basis, not of *contract*, but of custom: and the respondents' Vakil, in our opinion reasonably, objects to the appellant being allowed to alter his case at this stage. The admission of the contention, now raised, would necessitate the remand of the suits for findings on fresh issues and evidence; and such a course seems to us not justifiable. The appellant's Vakil has endeavoured to convince us that the required contract must be inferred from the long-continued course of payment, for which proposition he refers us to the judgments in the case above quoted. It is no doubt true that in that case Napier, J., presumed not only an agreement to pay the higher rates, but also consideration for the agreement from 60 years' payment. (*i. e.*,) a complete and enforceable contract. Sadasiva Aiyar, J., agreed that the same presumption *could* be drawn: though in his view of the case, that did not affect the result. Neither learned Judge, as far as we can gather, seems to have intended to lay down a general proposition that such a presumption must always be drawn and would be irrebuttable; and it is only if this were the case that we could deny the respondents an opportunity of adducing evidence to contest it. Apart from this, if we may say so with all respect, we doubt whether the decision in *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(2), on which the learned Judges rely, affords any support whatever for the presumption of consideration for the agreement from long-continued payment. On the contrary, as it seems to us, Subramania Aiyar, J., is at pains to emphasize the contrary, (*i.e.*,) "that though payment for a number of years at the rate of 8 *fanams*, may imply an agreement to pay in future at that rate, yet that will not imply a *contract* between the parties, for the obvious reason that there was no consideration to support such an agreement so as to make it a binding one."

And the same view was taken at a subsequent stage of the same litigation by a Bench to which one of us was a party [*Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3)]. The existence of an agreement was allowed to be inferred from long payment: but independent proof of consideration for the agreement was insisted on as necessary. We may also refer to a later case *Devi Bhuknoji Kasidoss Subbaraya* v. *Allamadugu Narayana Reddi* (4), for the same distinctions.

We must decline to allow a contract for the payment of the higher rates to be set

(1) (1915) 27 I. C. 688.

(2) (1905) 28 Mad. 444.
(3) (1912) 35 Mad. 134=8 I. C. 330.
(4) (1915) 28 I. C. 492.

up at this stage ; and we confirm the finding of the lower Courts as to the illegality of the *vanpayir* charge.

The other points in dispute may be more briefly dealt with. We agree with the lower Courts in holding that the disallowance of the claim for extra rent for a second dry crop is a necessary corollary of the decision that the rent for the dry land can be claimed independently of whether a crop was raised or not, and we see no reason to differ from their interpretation of the word '*palanthur*' in relation to the charge leviable on palmyra trees.

There remains only the question raised on issue No. 17 of the rent claimed on land No. 337 in Summary Suit No. 2881 (Second Appeal No. 1087 of 1913). It is classed as "Mandaikollai or Veetadikollai" and the District Judge, differing from the Sub-Collector, has held that rent claimed as due on it, cannot be recoverable by a suit under S. 77 of the Madras Estates Land Act. In our opinion, he is right in his conclusion. Of course if it were shown that the "Kollai" had been carved by the tenant out of *ryoti* land, without the landlord's consent, the latter would be entitled to recover rent due on it under the Act. But that is not the case here.

We dismiss the second appeals with costs.

S.N./R.K.

Appeals dismissed.

A. I. R. 1916 Madras 492

SADASIVA AIYAR AND NAPIER, JJ.

G. Kothandaramiah—Plaintiff---Appellant.

v.

Secretary of State—Defendant---Respondent.

Original Side Appeal No. 68 of 1914, decided on 15th March 1915, from the judgment of Bakewell, J., dated 12th August 1914,

Civil Service Regulation, Arts. 458 and 464—Officer removed from service before retirement cannot claim pension.

Under Articles 458 and 464 it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. Therefore, an officer removed by Government from service before that date, can have no claim for any pension. [P. 492, C. 2.]

T. Rangachariar, K. Narain Row and *C. Venkatsubbaramiah*---for Appellant.

Advocate-General and *Government Solicitor*---for Respondent.

Facts.--The plaintiff, while in Government service, was removed therefrom by the Government of Madras in 1901. Till 1913 he went on agitating the matter by way of appeal and not having had any redress, instituted the present suit for a declaration that he was entitled to a superannuation pension of Rs. 146-10-8 under Article 458 of the Civil Service Regulations and for other reliefs. Bakewell, J., who heard the suit, sitting on the original side, dismissed the same. The plaintiff appealed.

Sadasiva Aiyar, J.—The plaintiff is the appellant before us. He brought the suit for a declaration that he was entitled to a pension of Rs. 146-10-8 per mensem, or such other sum as the Court may fix from 1st August, 1913 till his death ; and for consequential reliefs. Paragraph 16 of the plaint says : Plaintiff is thus eligible for pension under Articles 458 and 459 of the Civil Service Regulations from and after 1st August, 1913, when plaintiff completed his age of 55 years." It was conceded in argument that Article 459 does not apply to the case, as the plaintiff was not "required" by the Local Government "to retire" when he attained the age of 55 on 1st August, 1913. The other Article 458, which is relied on, is (omitting irrelevant portion), "a superannuation pension is granted to an officer in superior service entitled by rule to *retire* at a particular age." Mr. Rangachariar, who appears for the plaintiff, asked us to read this Article with Article 464, which says that "an officer in superior service, who has attained the age of 55 years, may, at his option, retire on a superannuation pension." Now, it is clear, (and if I understood Mr. Rangachariar aright, it was conceded by him) that *prima facie* these articles are applicable only if, when the officer attains the age of 55, *he was in service*, and, *while so in service*, exercised his option to retire from service. It is admitted in the plaint (paragraphs 8 and 9) that in 1901 the plaintiff was removed from Government service by the Government of Madras. Paragraph 18 also makes it clear that the plaintiff ceased to be in Government service in 1901, as he

says in that paragraph that he was expecting all along to be reinstated in the Government service between 1901 and 1913 and was appealing to Government for restoration to service from time to time. I see nothing in any of the other sections quoted to us by Mr. Rangachariar from the Regulations, which compels us not to give effect to the plain meaning and implication of the words of S. 458, namely, that it is only an officer who is and has continued in Government service when and till he reached that age of 55, and who elects to retire at that age while so being in service, that is entiled to claim a pension under the Regulations. There being thus no basis at all in the Civil Service Regulations for the plaintiff's claim, the suit was rightly dismissed by the learned trial Judge and I would dismiss this appeal. The plaintiff must pay the defendant's costs.

Napier, J.—I entirely concur. The plaintiff claims a superannuation pension. The mere name for this class of pension is sufficient to put him out of Court, for it is clear that Article 458 of the Civil Service Regulations only applies to pensions granted to persons entitled or compelled to retire at a particular age. The plaintiff has neither been supperannuated nor did he retire. There is, therefore, obviously no foundation for this claim. I should like to add that we express no opinion as to whether this suit would lie, or whether these Regulations are conditions attached to the service binding on Government or whether this suit is maintainable without leave under the Pensions Act. All these points have not been dealt with by the trial Judge and we confine ourselves to the particular point on which the suit was dismissed.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 493

AYLING, J.

In re Pavallimanakkal Narayan Nampudripad - Accused—Petitioner.

Criminal Rev. Case No. 728 of 1914, and Criminal Revn. Petn. No. 611 of 1914, decided on 26th February, 1915, from the judgment of Joint Magte., Palghat, in Cri. Appl. No. 93 of 1914.

Penal Code (45 of 1860), S. 176—What amounts to failure to report is stated—Presence of another bound to report is not sufficient excuse—Failure to report raises presumption of intention to conceal.

Where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them, unless he can show that he had reason to suppose that the authority to which the report was due had the information from other sources.

[P. 493, C. 2. & P. 494, C. 1.]

The mere fact that another person was also present at the time of the occurrence and was under a similar obligation to report does not justify omission to report. 7 Mad. 436; 20 Cal. 316, dist.

[P. 493, C. 2.]

S. Swaminadhan—for Petitioner.

Public Prosecutor—for the Crown.

Order.—Petitioner in the case was bound under S. 8 of Act IV of 1884 to give information to the Police of an explosion of fire-works which resulted in the death of a child. He omitted to do so, and has been convicted of an offence under S. 176 of the Indian Penal Code.

The only question is whether his omission should be taken to be intentional. Dr. Swaminadhan for petitioner quotes the cases of *In re Pandya Nayak* (1) and the *Queen-Empress* v. *Gopal Singh* (2), but these rulings are only authority for the proposition that where the Police are already in possession of the information, a person cannot be convicted of an intentional omission under S. 176, because he fails to perform an entirely superfluous act in furnishing them with the information over again. In the present case, I am not referred to anything from which it would appear that petitioner had any reason to suppose that the Police had been informed of the matter by any one else. The most that can be said is that the Adhigari was also present, who was under a similar obligation to report; but this by itself is no legal justification for petitioner's omission.

It is also argued that the word "intentionally" in the section should be construed in the sense of an intention to conceal the facts which should be reported: but where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them, unless he can show that he had reason to suppose that

(1) (1884) 7 Mad. 436.
(2) (1893) 20 Cal. 316.

the authority to which the report was due had the information from other sources.

The extenuating circumstances of the case have been given due weight by the Sub-Divisional Magistrate and I find no reason for interference.

The petition is dismissed.

S. N./R. K.

Petition dismissed.

A. I. R. 1916 Madras 494

SADASIVA AIYAR AND NAPIER, JJ.

Authikesavaloo Naicker—Plaintiff--Appellant.

v.

Shah Abdulla Hussain Sahib Khadiri and *others* Defendants - Respondents.

City Civil Court Appeal No. 16 of 1913, decided on 19th March, 1915, against the decree of City Civil Court, Madras, in Original Suit No. 56 of 1913.

(a) Transfer of Property Act (4 of 1882), S. 53—Mortgagee decree-holder whose right to personal decree is not barred is creditor within S. 53.

A simple mortgagee who has obtained a decree for sale and whose right to a personal decree is not barred, is a "creditor" within the meaning of S. 53 of the Transfer of Property Act and can bring a suit to set aside an alienation made in fraud of creditors. [P. 494, C. 2.]

(b) Limitation Act (9 of 1908) Arts. 91 and 120—Art. 120 and not 91 or 96 applies to suit for setting aside alienation under Transfer of Property Act (4 of 1882), S. 53.

To a suit to set aside alienation under S. 53, T. P. Act, Article 120 and not Article 91 or 95, Limitation Act, 1908, applies. 10 Mad. 213; 30 Mad. 402; Foll. [P. 494, C. 2]

T. R. Venkatarama Sastri—for Appellant.

Sadasiva Aiyar, J.—The plaintiff is the appellant. The learned City Civil Judge correctly describes the suit as praying for a declaration that the sale of the property mentioned in the plaint on 1st April 1909, in favour of 1st defendant is null and void against plaintiff and that it is liable to be proceeded against in execution of the decree in Suit No. 89 of 1909 passed in favour of the plaintiff. The learned Judge further describes the suit as praying for an injunction restraining the 1st defendant from alienating the plaint property, but this seems inaccurate.

Turning to that portion of paragraph 12 of the plaint which refers to injunction, the prayer contained in that portion is that the 1st defendant be restrained by an injunction from alienating the plaint property in any manner "*pending the disposal of this suit.*" This cannot be treated as a prayer for an injunction to be embodied in the decree to be passed in the suit, but only as a prayer for an interlocutory order of injunction. Treating then this suit as a suit for a declaration of the invalidity of the alienation in favour of the 1st defendant as against the plaintiff, who is a creditor under a simple mortgage bond and who has obtained a decree for sale and who expected to get a decree on the personal covenant contained in the mortgage-deed after the mortgaged property was sold in execution of the decree passed in Suit No. 89 of 1909, the questions for decision are (1) whether he is a creditor within the meaning of S. 53 of the Transfer of Property Act and, therefore, entitled to bring a suit to have it declared that the alienation was in fraud of him and other creditors and is void as against him and them, and (2) whether his suit is barred by limitation.

Having regard to O. 34, R. 14 of the Civil Procedure Code (Old S. 90 of the Transfer of Property Act), it cannot, in my opinion, be argued that a simple mortgagee, whose rights under the personal covenant have not been barred, is not a creditor of the mortgagor and that he is not entitled to bring a suit to declare the invalidity of the alienations of other properties by his mortgagor (debtor).

As regards the question of limitation, I think the cases of *Tallapragada Sundarappa* v. *Boorgapalli Sreeramulu* (1) and *Pachamuthu* v. *Chinnappan* (2) establish that the limitation for a suit of this nature is provided for by the general Article 120 (6 years) and not by Article 91 or 95 of the first Schedule to the Limitation Act. The decision of the learned City Civil Judge that the suit is barred by the three years' period of limitation cannot be sustained.

(1) (1907) 30 Mad. 402.
(2) (1887) 10 Mad. 213.

I must also state that the observation of the learned City Civil Judge in his judgment, dated 10th May 1913, that the plaintiff had taken no steps whatever to add Hakim Muhummad Ghouse Sahib as a party to the suit, is not accurate as the plaintiff on the 12th March 1913 had applied to the lower Court for bringing Hakim Muhummad Ghouse Sahib on record as the 8th defendant in the case and also prayed for an amendment of the plaint. Another amendment petition, filed on the 18th March 1913, also makes it clear that he wanted Hakim Muhummad Ghouse Sahib to be made a party and to amend the plaint by inserting additional allegations, to the effect that the plaintiff apprehended (and I take it that he meant it was a reasonable apprehension) that the sale of the mortgaged properties in execution of the decree in Suit No. 89 of 1909, could not fetch the whole of the amount due under the decree. I would, therefore, further set aside the orders of the learned City Civil Judge refusing the prayers of the two petitions, dated 12th and 18th March 1913, and would grant the prayers of those petitions. The amendments should be made by the plaintiff within two weeks of the receipt of the records by the City Civil Court or such other time as may be allowed by that Court. The decision of the City Civil Judge is set aside and the suit remanded for disposal on the other issues, which arise on the pleadings already on record and which might hereafter be raised in due course of law.

Costs hitherto incurred will abide the result.

Napier, J.—I concur.

S.N./R. K.

Appeal allowed ; Suit remanded.

A. I. R. 1916 Madras 495

SADASIVA AIYAR, J.

Kandasami Asari—Petitioner.

v.

Norayana Asari and *others*—Respondents.

Criminal Revn. Case No. 468 of 1914, and Criminal Revn. Petn. No. 395 of 1914, decided on 10th December, 1914, from the order of Divl. Magte., Tuticorin, in Mis. Case No. 5 of 1914.

Criminal P. C. (5 of 1898), S. 145—S. 145 is not applicable when possession is not exclusive or superior to other party.

A Magistrate has no jurisdiction to pass an order under S. 145, Criminal Procedure Code, when the possession of the applicant is neither exclusive nor superior to that of the opposite party but is on behalf of both the parties and the applicant merely wants a declaration to that effect. 4 C. W. N. 426 ; Foll. 31 Mad. 318 ; 2 Weir 99, dist. [P. 495, C. 2.]

V. C. Seshachariar—for Petitioner.

M. D. Devadoss—for Respondents.

Acting Public Prosecutor—for the Government.

Order.—The respondents (2nd party) admit in their counter-petition that the *Hukdars* of the temple consist of members both of the petitioner's sub-caste and of the respondents' sub-caste (paragraph 2 of the counter-petition). They did not allege that their sub-caste *Hukdars* alone are entitled to the exclusive possession and management of the temple. On the other hand, they merely wanted a declaration that "the temple is the common property of all Asaries." (Paragraph 7 of the counter-petition).

The ruling in *Tarujan Bibee* v. *Asamuddi Bepuri* (1) directly applies, and the learned Magistrate had no jurisdiction on the finding he arrived at to pass any order under S. 145, Criminal Procedure Code, as the respondents' possession was on their own allegations not exclusive possession or superior possession but possession, on behalf of all the *Hukdars*. In the case of *High Court Proceedings, 15th November, 1880, No. 2301* (2), the successful party was in exclusive possession. In *Bhaskaruni Kesavarayadu* v. *Bhaskaruni Chalapatirayudu* (3) the possession of the manager of a Hindu family, which possession was in quality superior to that of the junior members, was protected. These two cases cited by Mr. Devadoss for respondents are, therefore, clearly distinguishable.

The learned Magistrate's order is, therefore, set aside.

S. N./R. K.

Order set aside.

(1) (1900) 4 C. W. N. 426.
(2) (1890) 2 Weir 99.
(3) (1908) 31 Mad. 318.

A. I. R. 1916 Madras 496

AYLING AND TYABJI, JJ.

Conjeevaram Hodgsonpet Thanarakshana Nidhi - Plaintiff—Appellant.

v.

Kandasawmy Naicker and *another* — Defendants—Respondents.

Second Appeal No. 2020 of 1913, decided on 18th January, 1915, against the decree of Dist., Judge, Chingleput, in Appeal Suits Nos. 566 and 567 of 1911.

Company—Contract—Subsequent resolution cannot affect prior contracts.

Once the rights of the parties dealing with a registered Company, have become fixed by a contract, the Company cannot by a resolution subsequently passed by it alter those rights.

Allen v. *Gold Reefs of West Africa Ltd.*, (1900) 1 Ch. D. 656; Foll. [P. 497, C. 1.]

T. Rangachariar—for Appellant.

T. V. Muthukrishna Aiyar and *T. Narasimha Aiyangar*—for Respondents.

Judgment.—The plaintiff is a limited liability Company registered under the Indian Companies Act and sues the defendants under the following circumstances.

The Company has for its object the collection of subscriptions at the rate of rupee one or its multiples per month from its subscribers. When a subscriber has regularly paid 80 such instalments of a rupee each, he becomes entitled to receive Rs. 100. In case of default of payment interest is charged on the unpaid instalments at 18¾ per cent. per annum. If any instalments are not paid at the end of the 80 months, then the subscriber gets back (under the present 13th Article of Association) only such sums as he has paid deducting thereform interest on the unpaid instalments at the rate mentioned.

In addition to the above-stated conditions the subscribers are entitled to borrow from the Company on certain terms.

The 1st defendant subscribed for 25 "shares." He became liable, therefore, to pay Rs. 25 per month and would have become entited to receive Rs. 2,500 if he had subscribed regularly for 80 months. But he availed himself of the power to borrow, and receive Rs. 1,000 and Rs. 1,500 from the Company under Exhibits A and B. The questions in this appeal are concerned with the rights and liabilities of the parties under Exhibits A and B and the Articles of the Company in the events that have taken place, namely, that the 1st defendant has paid 49 out of the 80 instalments of Rs. 25 per mensem due from him and has made default in paying the remaining 31.

Exhibits A and B are most inartificial. We have had great difficulty in construing them. As the result of careful argument, however, we consider that by the last three sentences in Exhibit A (which alone need be referred to, as Exhibit B is not materially different) it is intended respectively to provide (1) that the defendants should pay interest at 6¼ per cent. per annum on the sum of Rs. 1,000 advanced to them under Exhibit A with and in addition to the instalments of Rs. 25 per mensem, (2) if the said interest and the subscription are not paid punctually, the defendants are also to pay compound interest at 18¾ per cent. per annum on the consolidated sum due, (3) that the properties mortgaged be charged with the entire balance due on the date of default after deducting the previous payments.

The difficulty lies in construing the last of the three sentences above referred to. The respondents argue that the entire balance due on default must mean merely the unpaid subscriptions together with interest on them and interest on the 6¼ per cent. interest. The appellant's contention is that the balance due means the amount due on the mortgage, *i. e.*, the Rs. 1,000, deducting therefrom the subscriptions already paid. Accepting the latter contention does not, however, help the appellant; for in that case the deduction would consist of the whole of the subscriptions paid by the defendants in regard to each mortgage, *viz.*, on Exhibit A the defendants would be entitled to claim for principal Rs. 1,000 less 31 times twenty-five rupees and similarly on Exhibit B, Rs. 1,500 less 31 times twenty-five rupees. The appellant can succeed in his contention only if in the one case 31 times ten rupees are deducted and in the other 31 times fifteen rupees.

It is clear, therefore, that no construction of Exhibits A and B can assist

the appellant, and the learned Pleader, who appears for the appellant, was not prepared to put forward any contention to escape from this difficulty.

The appellant's contention then was that assuming that Exhibits A and B cannot assist him, he can rely upon the general law that he should get back the amounts he has advanced less such sums as may be found due to the 1st defendant on account of the subscriptions already paid by him. The amount that the 1st defendant is thus entitled to be credited with is (it is contended) shown by the 13th Article of Association.

It seems to us that Exhibits A and B and the Article must be read together. On doing so, the real transaction between the parties appears to be that the 1st defendent as a subscriber was allowed to anticipate the sum of Rs. 2,500 which would have become due to him as a subscriber of 25 shares, after the eightieth month. In order to secure for the due payment of instalments the Company obtained mortgages from the defendants and they agreed to pay 6¼ per cent. interest on the sum of Rs. 2,500 so anticipated. Exhibits A and B really provide only for the due payment of the further subscriptions by the defendants and for securing the interest on such subsciptions, should default be made in payment of them. It is only in this view that the documents can be read in any reasonable manner.

Are the defendants' rights then altered by the Articles on which the appellant relies? The Article specifically relied upon is Article 60, which does not in terms deal with the liability of a subscriber placed as the defendant is placed. Article 60 merely requires the Directors to institute suits for a particular amount. The Article was added by a special resolution of the Company at a date subsequent to that when the defendants' 80 months expired; and even assuming that the 1st defendant then continued to be a member of the Company, it was added after the dates of Exhibits A and B. We think, therefore, that the defendants' rights and liabilities under Exhibits A and B cannot be affected by the Article: *Allen* v. *Gold Reefs of West Africa Ltd.* (1).

(1) (1900) 1 Ch. 656=69 L. J. Ch. 266.

In our opinion, reading the Articles of Association and Exhibits A and B together, the most reasonable conclusion to be drawn is that the defendants should be held liable to pay only the unpaid instalments with interest. That is the conclusion at which both the lower Courts arrived, though for reasons different from those that we have mentioned.

It is conceded by both sides that the District Judge's remarks in paragraph 5 of his judgment are based on an erroneous view of the facts and that the District Munsif is right on this point. The District Munsif's decree will, therefore, be restored.

The parties will give and receive proportionate costs throughout. If there is any balance due from the defendants they should pay it within three months from this date. Interest on the consolidated amount due under the decree of the District Munsif, after the date fixed by him for payment, will be at 6 per cent. per annum.

S. N./R. K.

Appeal partly allowed.

A. I. R. 1916 Madras 497

SADASIVA AIYAR AND NAPIER, JJ.

P. S. Sivarama Aiyar—Defendant—Appellant.

v.

Muthu K. R. Alagappa Chetty—Plaintiff—Respondent.

Original Side Appeal No. 94 of 1913, decided on 6th September, 1915, from the Judgment of Wallis, J., in Civil Suit No. 58 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 111 (g)—Intention to determine lease can be expressed by Lawyer's notice.

The expression "some act showing his" (lessor's) "intention to determine the lease," occurring in S. 111, clause (*g*) must not be confined to an attempt at re-entry or to the filing of a suit in ejectment. A Lawyer's notice by the lessor showing unequivocally his intention to determine the lease is quite sufficient.

[P. 498, C. 1.]

(b) Mesne Profits—Person in occupation without owner's permission is liable.

A person who is in illegal occupation of land without the owner's permission or consent is liable for mesne profits. [P. 498, C. 1.]

A. Duraisami Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondent.

Facts.—Plaintiff, a Nattukkottai Chetty mortgagee with possession of certain buildings known as Triumph Buildings opposite the Madras High Court, leased the same to one Mr. Patel for seven years at a monthly rental of Rs. 470, on condition that if the lessee committed default in payment of rent for two consecutive months, the lessor would be at liberty to re-enter. Mr. Patel sub-let a portion of the building to the defendant at Rs. 200 a month. Mr. Patel committed default in payment of rent, and the plaintiff gave notice to Mr. Patel and his sub lessees to vacate the same. The defendant contended that he had paid Rs. 1,000 to Mr. Patel as advance, that he was entitled to remain in possession until that amount was paid and that he would not vacate. The plaintiff then sued to recover rent for the period the defendant was in occupation. Mr. Justice Wallis before whom the case came on for hearing on the original side of the High Court gave a decree for the plaintiff. The present appeal is against the decree.

Judgment. The *first* contention of the appellant's learned Vakil is that the expression "some act showing his" (lessor's) "intention to determine the lease", occurring in S. 111, clause (*g*), of the Transfer of Property Act must be confined to an attempt at re-entry, or to the filing of a suit in ejectment, where the forfeiture is incurred by the breach of a condition of the lease-deed providing for re-entry on such breach. We must decline to put such a restricted construction on the very general phrase "some act" occurring in the Statute. The Lawyer's notices by the plaintiff in this case showing unequivocally his intention to determine the lease are, therefore, sufficient.

The *next* contention is that the appellant (2nd defendant) is not liable for rent, or to pay compensation for use and occupation, because he was neither the plaintiff's tenant, nor did he continue in possession with the plaintiff's permission. The short answer to this contention is that he has been made liable for mesne profits as a person in illegal occupation and not as a tenant, permissive or otherwise.

Lastly, the learned Judge was right in making the 2nd defendant liable for mesne profits at Rs. 200 a month on his own admissions (see his evidence and his written statement in this case) that he has continued in possession of the same premises for which he had agreed to pay Rs. 200 rent to the 1st defendant.

The appeal, therefore, fails and is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 498

AYLING AND SADASIVA AIYAR, JJ.

Govindan Nair and *others*—Defendants—Appellants.

v.

Cheral and *others*—Plaintiffs and others—Defendants—Respondents.

Second Appeal No. 2109 of 1912, decided on 6th August, 1913, from the decree of Sub. Judge, South Malabar, in Appeals Nos. 302 and 317 of 1911.

Interest Act (23 of 1839), S. 1—Debt expressed in measures of grain is debt certain within S. 1 although commutation has to be determined.

A debt which is expressly expressed in measures of grain and payable at a specified time should be regarded as a debt certain within the meaning of S. 1 of Act XXXII of 1839 although the commutation rate at the time of payment or suit may have to be determined.

[P. 498, C. 2 & P. 499, C. 1.]

C. V. Ananthakrishna Aiyar—for Appellants.

T. R. Ramachandra Aiyar—for Respondents.

Judgment. In our opinion, the Subordinate Judge's findings of fact as to the plaintiff's right to redeem cannot be said not to be based on evidence and must be accepted.

The appellants' Vakil argues, relying on *Narayan Ramachandra Bhatta* v. *Manager Nagappa* (1), that the award of interest on a debt payable in kind is not authorised by Act XXXII of 1839. With great respect to the opinion of the learned Judges who were parties to the decision above quoted, we are unable to agree with their view.

We fail to see why a debt which is specifically expressed in measures of grain and payable at a specified time should not be regarded as a debt certain (assuming the latter adjective in S. 1 of the Act to qualify the word "debt" as

(1) (1910) 8 I. C. 411.

well as "sum") merely because the commutation rate at the time of payment or suit may have to be subsequently determined. We do not find anything in the other case quoted by the appellants' Vakil, *Juggomohun Ghose* v. *Manickchund* (2) to conflict with this view. In our opinion the award of interest on the *porappad* in the present case was justified.

The rate of interest is, however, very high (20 per cent.) and it runs for a period of 40 years and more. Accepting the finding of the Subordinate Judge that this is the usual rate in Malabar, the Act, authorises the award of interest at a rate "not exceeding the current rate" and we consider that, in the present case, the Court would have exercised its discretion wisely in reducing the rate to 6 per cent. The decree will be amended accordingly.

We see no reason why the interest awarded should not be set off against the sums due for *kanom* amount and improvements.

The appellants will pay half the respondent's costs in this Court. The time for redemption is extended to six months from this date.

The Subordinate Judge's decree with the modification above directed is confirmed.

S. N./R. K.

Decree modified.

(2) (1857-59) 7 M. I. A. 263=4 W. R. 8 (P. C.)

A. I. R. 1916 Madras 499

OLDFIELD AND TYABJI, JJ.

Issakkanakath Maliyakkal Muhammad Hajee—Plaintiff—Appellant.

v.

Pourakurikkalakath Kunhi Mammad and *others*—Defendants—Respondents.

Second Appeal No. 680 of 1913 and Civil Rev. Petn. No. 382 of 1913, decided on 4th December, 1914, against the decree of Sub-Judge, South Malabar, in Appeal Suit No. 668 of 1912.

Civil P. C. (5 of 1908), O. 41, R. 20—Even discharged persons are parties within R. 20 and can be impleaded in appeal.

Order XLI, R. 20 of the Civil Procedure Code applies to persons who were parties to a suit; and persons are nonetheless parties because they ceased to be so before the passing of a decree. An Appellate Court is, therefore, authorized to consider whether they are interested in the result of the appeal, and to implead them if it thinks that they are so. 34 Mad. 228, Foll. [P. 499, C. 2.]

T. R. Krishnaswami Aiyar for *T. R. Ramachandra Aiyar*—for Appellant.

N. A. Vaidyanatha Aiyar for *C. V. Ananthakrishna Aiyar*—for Respondents.

In S. A. No. 680 of 1913.—The learned Subordinate Judge observed that he had nothing to do with the question whether certain respondents were necessary parties to the appeal before him, because no appeal would lie against the order of the District Munsif striking off their names and there was no decree in their favour to be appealed against. He, therefore, dismissed the appeal.

We dissent from this decision. The Subordinate Judge's first reason for it is met by reference to *Raja Dhamara Kumara Thimmanayanim Bahadur Varu* v. *Bukkapatnam Venkatacharlu* (1). His second is unsound, because though there was no decree in favour of the defendants in question, the plaintiff had been refused a decree against them in his suit and had obtained no relief in respect of a part of the claim put forward in his plaint. We think that O. 41, R. 20, of the Code of Civil Procedure clearly authorised the Subordinate Judge to consider whether these defendants were interested in the result of the appeal and to implead them, if he thought that they were so. For that rule applies to persons who were parties to the suit; and the defendants were nonetheless parties to the suit, because they ceased to be so before the passing of a decree.

The second appeal is allowed, the lower Appellate Court's decision being set aside and the appeal being remanded for re-admission and disposal in the light of the foregoing. Costs to date in the lower Appellate Court and here will be costs in the cause.

C. R. P. No. 382 of 1913.—Second appeal No. 680 of 1913 having been allowed, this civil revision petition is dismised. There will be no order as to costs of this petition.

S. N./R. K.

Appeal allowed; Petition dismissed.

(1) (1911) 34 Mad. 228=6 I. C. 239.

A. I. R. 1916 Madras 500

WALLIS, C. J. AND COUTTS-TROTTER, J.

Venkataramanna—Defendant—Appellant.

v.

K. J. Venkatapathi Nayanivaru—Plaintiff—Respondent.

• First Appeal No. 36 of 1913, decided on 25th February, 1915, against the decree of Sub-J. North Arcot, in Original Suit No. 79 of 1911.

(a) Grant—Construction--*Kayam Patta* **grant regarded as perpetual is heritable.**

Where a grant under the heading *kayam patta* was made in 1857 and the grantees dealt with their tenants as if they were entitled to permanent rights and in compensation for acquisition of land for public purposes the grantee and grantor both shared and evidence proved that the grantor regarded the grant in the terms of neighbouring villagers as a permanent grant:

Held, that a heritable permanent grant was conveyed in those terms.

(b) Grant—Construction--*Kayam Patta* **means perpetual lease—Meaning of** "*Istimrari Mokurari*" **and** "*Kayam Sasvatha*" **denotes life estate—Where grant may be inferred as heritable stated—Intention of parties must be considered.**

Wallis, C. J.—*Prima facie* the words "*kayam patta*" mean 'perpetual lease.' But a long course of decisions have held that these words and the words "*istimrari mokurari*" and "*kayam sasvata*" do not *prima facie* convey more than life-estates. When land or interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson' or 'from generation to generation' or the like. In construing grants one has to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant. [P. 500, C. 1 & 2.]

Coutts-Trotter, J.—In 12 Cal. 117 the Privy Council have expressly used those words to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction. [P. 501, C. 2.]

L. Venkataraghava Aiyar—for Appellant.

S. Swaminadhan—for Respondent.

Wallis, C. J.—This case is one of some difficulty and rather on the line, but after hearing the very full arguments of the Counsel on both sides we have come to the conclusion that we cannot support the decision of the Subordinate Judge.

The question is as to whether the terms of Exhibit A amounted to a permanent grant. The words used are "*kayam patta*" which are translated as 'perpetual lease.' *Prima facie*, of course, these words would be taken to mean what they say. But there is a long course of decisions, mostly in cases arising in Northern India but treated by this Court as applicable also to this part of India, that having regard to the general usage of the country such words as these and the words "*istimrari mokurari*" do not *prima facie* convey more than life-estates. That doctrine was applied to this part of India and to a term similar to that in the present case in *Rajaram* v. *Narasinga* (1). The term there was "*kayam saswata patta*" which is even stronger, as the word *saswata* is not used here, and yet the Court consisting of Parker and Shephard, JJ., held that it did not convey a permanent right, and in *Foulkes* v. *Muthusami Goundan* (2), Subramania Aiyar and Moore, JJ., did not differ from the law as there laid down. They say "It is quite true, as urged for the appellant, that when land or even an interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson,' 'from generation to generation' or the like. In the present instance, however, there was no transfer of land or an interest in land, but only an agreement as to the rate at which assessment was to be paid in respect of lands in which the party bound to pay the assessment admittedly already possessed a heritable estate." They accordingly distinguished the case before them on that ground. But while that is the general principle, at the same time it has been again and again laid down by their Lordships of the Judicial Committee that we are to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant. For that proposition it is only necessary to refer to the decision *Tulshi Pershad Singh* v. *Ram Narain Singh* (3). On page 130 their Lordships say: "After this review of the decisions, their Lordships think it is established that the words *istimrari mokurari* in a *pattah* do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the

(1) (1892) 15 Mad. 199.
(2) (1898) 21 Mad. 503.
(3) (1886) 12 Cal. 117=12 I. A. 205; 4 Sar. 646 (P. C.)

other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." The question which is one of some difficulty with which we are faced here is to decide whether the subsequent conduct of the parties is sufficient to enable us to say that the grant was perpetual, and we think that on the whole that question must be answered in the affirmative. The grant was made in 1857 and there are a number of documents, Exhibits I, IV and VIII, which would not perhaps be of very great value if they stood alone, showing that the grantees dealt with their tenants as if they were entitled to permanent rights. Then we have Exhibit IX of the year 1879 which is a mortgage by the grantee to the grantor for Rs. 700. It is said that it may have been the life-interest only of the grantee that was mortgaged; but that is by no means apparent, when we consider this grant with the further documents which have been referred to. We have Exhibit B of the year 1895, which is a documeut of compromise between the grantor and the grantee and his sons; and in that document it is distinctly stated that the grantee has a permanent right. Not only is the grant spoken of as a permanent grant, which expression would scarcely have been used by the *zemindar's* people so soon before the right of redemption was likely to fall in if they denied the permanent character of the grant, but also there is this stipulation: "Out of the Rs. 80, the permanent total yearly amount of demand which you have to pay, every year we shall remit permanently at the rate of Rs. 40 a year." In "which you have to pay" the plural 'you' is used, and in a document from a superior to an inferior suggests that it applied both to the grantee and his sons. Then we have Exhibits XV and XV (*a*) which show that when certain of these lands were acquired for public purposes, the compensation was paid to the grantee and that grantor and his heirs made no claim to any share in it. But stronger than all these is the evidence as to the way in which the grantor regarded grants in these terms of neighbouring villagers. Exhibit VI is a purchase by the grantor from the grantee under Exhibit V, which is similar in terms to the present document. It is sought to suggest now that this was a purchase only of the life-interest of the grantee; but there is nothing in the document to support that suggestion. Then we have a still stronger instance in Exhibits XVII and XVII (*a*). Under Exhibit XVII a representative of the grantee sold a share in the village to a third party and Under Exhibit XVII (*a*) the heir of the grantor in the year 1892, that is, forty years after the date of the grant in question, purchased that part of the village which had been alienated under Exhibit XVII. It is immaterial whether the original grantee was dead, as he most probably was at that period, because forty years after the grant his expectation of life must be very small in this country and not worth purchasing. It is, we think, exceedingly significant, as showing the way in which these grants, were regarded by these people, that the grantor's heirs should have purchased back part of the grant. On the whole I think there is sufficient in the subsequent conduct of the parties to take the case out of the rule which is laid down in *Rajaram* v. *Narasinga* (1) and I would, therefore, reverse the decree of the Subordinate Judge and dismiss the suit with costs throughout.

Coutts-Trotter, J.—I agree, I should only like to add this. I think the language which their Lordships of the Privy Council employed in *Tulshi Pershad Sinkh* v. *Ram Narain Singh* (3) was expressly used in order to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction; and I think we are carrying out the intention of their Lordships in giving full effect to the surrounding circumstances of the case.

S.N./R.K.

Appeal allowed.

A. I. R. 1916 Madras 502

SADASIVA AIYAR AND NAPIER, JJ

Perumal Gramani—Defendant—Appellant.

v.

Mahamad Kasim Sahib—Plaintiff—Respondent.

Second Appeal No. 902 of 1913, decided on 5th November, 1914, against the decree of Dist., Judge, Chinglepet, in Appeal Suit No. 475 of 1911.

(a) Trustee—Power—Perpetual lease if not necessary or beneficial is beyond power—Custom giving such power is invalid.

The permanent lease of a religious trust property which is neither necessary nor beneficial to the trust, is beyond the power of a trustee and a custom which would give him this right, is not a valid custom. 34 Mad. 535, Foll.

[P. 502, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 51—Person believing having absolute right and not one believing to have merely permanent occupancy right can get compensation.

The right to claim compensation for improvements under S. 51, exists only in favour of a person who makes improvements believing that he is absolutely entitled to the property and not in favour of one who merely believes he has got a permanent right of occupancy in it for building purposes. [P. 502, C. 2.]

(c) Evidence Act (1 of 1872), S. 115—Trustee.

A religious trust will not be estopped by any act or conduct of its trustee committed in breach of trust. [P. 503, C. 1.]

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*—for Appellants.

C. Narasimhachariar—for Respondent.

Sadasiva Aiyar, J.— The defendant is the appellant. He obtained permanent lease of a vacant site in the town of Conjeeveram belonging to a religious trust called "*darga*" (the burial place of a Muhammadan saint) and has built a house upon it. The lower Appellate Court found the perpetual lease invalid, as it was beyond the powers of the trustees to grant such a lease and it has decreed ejectment against the appellant allowing him two months to remove the buildings erected on the site. The defendant's contentions in the second appeal are :

(*a*) That the permanent lease should have been upheld as it was the custom of the *darga* for many a year to grant permanent leases of the *darga* sites ;

(*b*) that it was to the advantage of the *darga* that such a permanent lease should be granted and

(*c*) that the plaintiff should have been directed to give compensation for the building instead of the defendant being merely allowed to remove the superstructure.

The *second* contention, namely, that it was to the benefit of the *darga* to grant a permanent lease is a question of fact, and we cannot interfere with the finding of the District Judge that there was no necessity to give a permanent lease and that such a lease was not for the benefit of the *darga*.

As regards the *first* contention, the general rule undoubtedly is that a permanent lease of a religious trust property is beyond the powers of the trustee. [See *Devasigamani Pandarasannadhi* v. *Palaniappa Chettiar* (1).] As regards the custom of the *darga*, the custom seems to have been begun only about 50 years ago and the custom by which trustees are to exceed their lawful powers cannot be considered a valid custom. Of course, no single trustee and no succession of trustees can create a lawful usage by acts in excess of their legal powers or constituting breaches of trust on their part.

As regards the *last* contention, Mr. T. R. Krishnaswami Aiyar for the appellant advanced his arguments in two ways. (1) He argued from the analogy of S. 51 of the Transfer of Property Act that the defendant, having in good faith, built the house, is entitled to be given compensation before he is evicted. (2) He further argued that the plaintiff, having stood by when the house was erected, is estopped from claiming to evict him without paying such compensation. I think the analogy of S. 51 of the Transfer of Property Act cannot be invoked. The Legislature has chosen to grant the right to claim compensation only to the man who makes improvements believing in good faith that he is "absolutely entitled" to the land on which he effects improvements, and not to a person who merely believes that he has got a permanent right of occupancy over a building site. As regards the second contention, the plaintiff is a

(1) (1911) 34 Mad. 535=9 I. C. 281.

religious trust, *darga*. represented by its trustees and is not bound by any act or omission of its trustees which constituted a breach of trust. There can, therefore, be no question of estoppel as against the *darga*. Further the conduct of a landlord who allows a tenant to erect a permanent structure might estop him in three ways in favour of the tenant: (*a*) it might estop the landlord from denying that the tenant has a right of permanent occupancy, (*b*) it might estop the landlord from evicting the tenant without paying him compensation, (*c*) it might estop him from denying the tenant's right to remove the superstructure, that is, from raising the contention that the superstructure having become permanently fixed to the site has become his (the landlord's) property and passes on eviction to the landlord. The first estoppel cannot arise in this case, as the lease itself which allowed a permanent right of occupancy has been found invalid as against the *darga*. If the trustee has got no legal right to grant a permanent lease to bind the *darga*, his conduct in allowing the building to be erected can still less constrain the *darga* to allow a permanent occupancy right to the tenant. The third question need not be considered as the lower Court has allowed the defendant to remove the superstructure and no appeal has been preferred on behalf of the *darga*.

In the result I would dismiss the second appeal with costs, granting, however, the appellant an extension of time till six months from this day to remove the superstructure.

Napier, J.—I concur.

S. N /R. K.

Appeal dismissed.

A. I. R. 1916 Madras 503.

AYLING AND TYABJI, JJ.

Bulusu Venkateswarudu and *others*—Plaintiffs—Appellants.

v.

Nimushakavi Bala Tripurasundari and *others*—Defendants—Respondents.

Second Appeal No. 2726 of 1913, decided on 31st August 1915, from the decree of Dist. Judge, Godaveri in Appeal Suit No. 14 of 1912.

Transfer of Property Act (4 of 1882), Ss. 83 84—Application under S. 83 dismissed before notice to mortgagee—Deposit in Court does not stop interest.

A deposit under S. 83 of the Transfer of Property Act and the subsequent dismissal of the application before service of notice on the mortgagee, is in effect no tender even if the money remains in Court. The dismissal of the application is tantamount to a withdrawal of the money and interest does not cease to run under S. 84 of the Transfer of Property Act. 35 Mad. 44 Foll. [P. 503, C. 2.]

B. Narasimha Rao—for Appellants.

P. Narayanamurthy—for Respondents.

Ayling, J.—The question is whether the defendants are entitled to the benefit of S. 83 of the Transfer of Property Act in respect of the sum deposited in Court by their father on 11th April 1908 with the petition, Exhibit I. This petition was dismissed at the depositor's own request on 23rd November, 1908, before notice was served on B. Subba Rao, one of the mortgagee's heirs. Respondents' Vakil argues that as the money was still left in Court, it was at the disposal of the mortgagee's heirs, but it seems clear to me that after the dismissal of the petition on 23rd November 1908 none of the mortgagee's heirs could have obtained payment of the money and no Court would have ordered payment under such circumstances. The dismissal of the petition was, therefore, tantamount to the withdrawal of the money and following the ruling of *Krishnasawmi Chettiar* v. *Thippa Ramasawmi Chettyar* (1), I must hold that the defendants are not entitled to claim cessation of interest.

I may add that even apart from this ruling, regarding the correctness of which my learned brother and I are not entirely at one, I fully agree with the reasons assigned by him for coming to the same view as myself in the present case.

Tyabji, J.– In this case it seems to me that interest did not cease to run under S. 84 of the Transfer of Property Act, for this reason that the mortgagors did not do all that had to be done by them to enable the mortgagee to take the amount out of Court. The original mortgagee had died before the deposit was made, leaving four sons as his heirs. The mortgagors brought the money into Court

(1) (1912) 35 Mad. 44=8 I. C. 763.

and after notice had been sent to three of the sons but before the fourth had received notice, they requested the Court to dismiss their petition in which they had prayed that the mortgagees should be asked to take the money in payment of the mortgage amount. The withdrawal of this petition was withdrawal of proceedings under S. 83 of the Transfer of Property Act. The mortgagors thus did not complete what they had to do under S. 83. In short the purport of Ss. 83 and 84 seems to me to be that when the mortgagor tenders through the Court the money due on the mortgage, he is relieved from payment of further interest because the mortgagee was in a position to receive the mortgage money and has refused to take it. Here there was no refusal because there never was any proper tender. For the tender (through Court) consists at least of deposit with notice to the persons entitled to withdraw the money and though the money was here deposited, there was no notice.

The result will be that interest on Rs. 593-2-0 at 10½ per cent. per annum from 12th May 1908 to 14th January 1912 will be added to the amount decreed with costs here and in the lower Courts with further interest at 6 per cent. per annum up-to-date of payment. Time for payment is extended by three months.

S. N. R. K.

Appeal allowed.

A. I. R. 1916 Madras 504

HANNAY, J.

(*Chakravadhanula*) *Suryanarayana* — Petitioner.

v.

(*Chahravadhanula*) *Venkata Rathamma* and *another* — Respondents.

Civil Revn. Petn. No. 75 of 1914, decided on 9th December, 1914, against the order of Dist., Munsif, Narasapur, in Exc. Petn. No. 389 of 1913.

Civil P C. (5 of 1908), S. 115 and O. 21, R. 66—Madras Civil Rules of Practice—R. 189—Receiver appointed for attached debt absence of enquiry about existence of debt is no irregularity under S. 115.

Where an application for attachment of a debt is made the Court is not bound to satisfy itself as to the existence of the debt and if it appoints a Receiver in consonance with R, 189 of the Civil Rules of Practice (Madras), it does not fail to exercise a jurisdiction vested in it by law or act with material irregularity in the exercise of such jurisdiction within the meaning of S. 115 of the Civil Procedure Code. 10 Mad. 194 and 4 Bom. 323. [P. 504, C. 2, & P. 505, C, 1.]

P. Narayanamurthi for *G. Venkataramiah* – for Petitioner.

P. Somasundaram – for Respondents.

Judgment.—The point urged before me is that the District Munsif ought to have inquired into and decided the plea of discharge set up by the garnishee and that by not doing so, the Court either failed to exercise a jurisdiction vested in it or acted with material irregularity in the exercise of that jurisdiction. The argument was that until the Court is satisfied that there is an existing debt, it cannot proceed to pass orders for the appointment of a Receiver or for sale of the debt under R. 189 of the Civil Rules of Practice. The decision in *Seriah* v. *Muckanachary*(1) is relied upon in support of the contention that an inquiry should be held. In that case it is observed that under S. 287 (*e*), corresponding to O. 21, R. 66, clause 4, of the present Code, the Court has power to summon any person it thinks necessary in order to ascertain the nature and value of the property and that "if there is notice or reasonable cause to suppose that there is no debt due, the Court not only can, but ought to satisfy itself on the point." The reference to S. 287 shows that the observation only applies to a case where sale is ordered, and it is evident from the citation of the case *Harilal Amthabhai* v. *Abhesang Meru* (2) and *Seriah* v. *Muckanachary* (1) that it was in the interests of the auction, purchaser that inquiry was considered necessary. It seems to me, therefore, that the case of *Seriah* v. *Muckanachary* (1) is hardly in point here. Assuming, however, that the principle would apply, there is no rule or provision of law which prescribes the course to be adopted by the Court in circumstances such as the present, in order to satisfy itself as to the existence of the debt. Then, altough the garnishee puts forward a document (Exhibit I) as evidence of the discharge set up by him, the decree-holder himself contended that Exhibit I

(1) (1887) 10 Mad. 194.
(2) (1879-80) 4 Bom. 323.

evidenced a sham transaction intended to defraud creditors. The lower Court in paragraph 4 of its order makes some observations which tend to show that it was inclined to accept that contention, and though it has not recorded a specific finding on the point, I take it that it was not satisfied that the plea of discharge was true. In these circumstances, I am unable to hold that the lower Court has failed to exercise a jurisdiction vested in it by law or has acted with material irregularity in the exercise of such jurisdiction. In the circumstances of the case, the lower Court appears to have acted in consonance with R. 189 of the Civil Rules of Practice by appointing a Receiver instead of ordering sale. The petition is dismissed with costs.

S. N/R. K.

Petition dismissed.

A. I. R. 1916 Madras 505

WALLIS, C. J. AND SRINIVASA IYANGAR.

Secretary of State—Defendant—Appellant.

v.

Perarulala Ramanuja Jeer Swamigal—Plaintiff—Respondent.

First Appeal No. 53 of 1914, decided on 29th July 1915, from the decree of Sub. J., Tinnevelly, in Original Suit No. 2 of 1907.

Madras Irrigation Cess Act (7 of 1865)—Claim to irrigate more land than entered in *Inam* title deed must be based on some other arrangement with Government.

Where an *inamdar* claims that he is entitled to irrigate free of charge in respect of a much larger area than that entered in the *inam* title-deed, it must be by virtue of some engagement with the Government other than the *inam* title-deed. [P. 505, C. 2.]

J. L. Rozario—for the Government.

M. A. Thirunarayanachariar—for Respondent.

Judgment.—This is a suit by the plaintiff to recover water-cess levied by Government on the amount of wet cultivation in the plaintiff's *inam* village of Oochikulam, which is in excess of the amount mentioned for that village in the *inam* title-deed, Exhibit O. Admittedly the *inam* title-deed constitutes an engagement with Government within the meaning of Act VII of 1865 to supply water free of charge for the area of wet cultivation in the village mentioned therein, but the Subordinate Judge has held that the plaintiff is entitled to irrigate free of charge in respect of a much larger area, and if this be so, it must be by virtue of some engagement with Government other than the *inam* title-deed. The plaintiff's case is that he has been all along since the *paimash* in 1802 cultivating about double this quantity of wet and that the amount entered in the title-deed is a mistake. Exhibit I, on the other hand, shows that the wet cultivation at the time of the *paimash* was only 41*k*. 4*m*. 2¾*p*. In support of this contention, he relies on certain *cadijan* accounts beginning with the early years of last century. We are not prepared to rely on these *cadijans* which have a very modern look and may well have been fabricated. In 1904 he was asked to support his case by accounts and failed to produce these *cadijans*. It is curious that in the very year in which the *inam* inquiry was held the plaintiff's *cadijan* accounts show a much greater extent of wet cultivation in this village than was givin by the plaintiff's predecessor to the Commissioner in his signed statement, Exhibit I*a*. We know how carefully the *Inam* Register was prepared and that the plaintiff had an opportunity of correcting the statement of the Revenue Officials, and that instead of so doing he gave a statement practically to the very same effect. It is not to be supposed that the Revenue Authorities would have fallen into such an error, or that if they had, the *inamdar* would have failed to point it out or would have accepted a title-deed in the terms of Exhibit O. The plaintiff's explanation that his statement to the *Inam* Commissioner related to the whole five villages and that there may then have been a deficiency of wet cultivation in the other villages which made his total accurate, is most improbable and no attempt has been made to show that there was any such deficiency in the other villages by producing the village accounts. In these circumstances we cannot act upon the *cadijan* accounts now put forward as proof that at the date of the *Inam* Settlement the plaintiff was really cultivating the amount which he claims. We cannot place any reliance either on the statements of the plaintiff's

witnesses that the lands now cultivated as wet were always so cultivated.

We allow the appeal and dismiss the suit with costs throughout

S.M./R.K.

Appeal allowed; Suit dismissed.

A I. R. 1916 Madras 506

SPENCER AND COUTTS-TROTTER, JJ.

Marji Jeta – Plaintiff—Appellant.

v.

Honnavar Puthu Hari Pai and *another*—Defendants—Respondents.

Second Appeal No. 1050, of 1913 decided on 29th July, 1915, from the decree of Sub-Judge., South Canara, in Appeal Suit No. 141 of 1911.

Contract Act (9 of 1872), Ss. 83 and 91—Goods shipped on instructions of defendant with direction to captain to deliver goods on payment of price—Goods damaged on way—No stipulation about damages—Purchaser held liable.

Where the plaintiff in pursuance of the instructions given by the 2nd defendant as agent of the 1st defendant. who carried on business at Honnavar, shipped 101 bags of Rangoon rice on board the "Machva" to Honnavar without indicating the consignee to the Captain but desiring that the rice should be delivered only on payment of the price, and owing to a storm in Mangalore Harbour, the ship was stranded and the rice damaged; on the question as to who was to bear the loss representing the difference between the contract rate and the rate at which the damaged rice was sold, there being no evidence as to the intention of the parties:

Held, that the property passed to the purchaser as soon as the goods were shipped, and the purchaser was liable for the loss. 32 Cal. 816, ref. to. [P. 507, C. 1.]

K. P. Madhava Rau, B. Sitarama Rau and *K. P. Lakshmana Rau*—for Appellant.

K. Yegnanarayana Adiga—for Respondents.

Judgment.—The question raised by this second appeal is whether the purchaser, *i.e.*, the 1st defendant is liable for the price of Rangoon rice shipped to him in pursuance of the instructions given by the 2nd defendant. The facts are that the 2nd defendant, as the agent of the 1st defendant who carried on business at Honnavar, instructed plaintiff at Mangalore to send to the 1st defendant 101 gunny bags of Rangoon rice by loading them in the "Machva." This instruction is referred to in Exhibit A, dated 1st May. On the 4th May the plaintiff shipped 101 bags of rice on board the "Machva" to Honnavar. No letter of requisition was given to the Captain of the ship instructing him to deliver the goods to the 1st defendant, the purchaser, but the plaintiff sent his servant in advance with the letter, Exhibit F, to the 1st defendant, dated 4th May, in which occurs the following passage: "As soon as they reach you, you should obtain them and write to that effect. The rate, description and *ankda* thereof will be communicated to you later on. As there is a great urgency for money you should pay Rs. 700 to Mr. Venkatesa Prabhu, the bearer of this letter." On the 7th May, there was a storm in Mangalore harbour, the ship was stranded and the rice was damaged and had to be sold at a considerable loss.

The question to be considered is, which of these persons is to bear the loss representing the difference between the contract rate and the rate at which the damaged rice was sold. The Courts below have held that the loss must be borne by the plaintiff, on the ground apparently that as the vendor shipped the goods without indicating the consignee to the Captain and desired that the rice should not be delivered until its price was paid, it could not be held that the property in the goods passed from the vendor to the purchaser. It is suggested that in the Indian Law the position is different from that under the English Law. It is quite clear in English Law that the passing of the property will be governed by the intention of the parties, and that the rules laid down in S. 18 of the Sale of Goods Act for the determination of what the intention of the parties is are not to override the intention of the parties, if that intention is otherwise clear. It is suggested that in India, the law is different and whatever be the intention of the parties in fact, the Statute lays down definite rules in accordance with which the property passes at the time and in the circumstances prescribed in the rules. That appears to be the view taken by the Calcutta High Court in the case of *Brij Coomaree* v. *Salamandar Fire Insurance Co.* (1). It is not necessary for the purpose of this case to decide whether this is the true construction of the Statute or not, because in this case there is no evidence that the intention of the parties, *i.e.*, of

(1) (1905) 32 Cal. 816.

both of them was that the passing of the property should not follow the ordinary course. In the ordinary course, as a result of Ss. 83 and 91 of the Indian Contract Act, property would pass on shipment. When the 2nd defendant instructed the plaintiff to sell him rice and sent it on board the ship, he must be taken to have proposed to the plaintiff that the property should pass to the purchaser upon shipment. That was the offer and plaintiff accepted it by shipping the goods and the acceptance was not made subject to the condition that plaintiff should reserve to himself the right of disposal until the price of the goods was paid.

On these grounds we hold that the property passed as soon as the goods were shipped and the loss must fall on the 1st defendant. We allow the appeal with costs in this Court and dismiss the memorandum of objections.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 507 (1)

AYLING, J.

Maharaja of Venkatagiri—Petitioner.

v.

Ambarkana Srinivasa Row—Respondent.

Criminal Revn. Case No. 438 of 1914 and Criminal Revn. Petn. No. 368 of 1914 decided on 15th March, 1915, against the order of Sub-Divl. Magte., Gudur, dated 28th February, 1914, in Misc. Case No. 3 of 1910.

Criminal P. C. (5 of 1898), S. 146—Attachment under S. 146 is in force till withdrawn—It ought to be withdrawn after competent Court's order.

An order of attachment of property under S. 146 remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto or of the person entitled to possession.

[P. 507, C. 1 & 2.]

S. Subramania Iyer—Petitioner.

P. R. Grant—for Public Prosecutor.

I. V. Ramanuja Rao—for Respondenf.

Order.—An order of attachment of property under S. 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment, as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto, or the person entitled to possession. The only question is whether that has been done in the present case. The finding of the District Judge on the first issue in Original Suit No. 3 of 1902 concludes the question of title between the parties to that suit. The fact that he was unable to determine the question of possession and that this Court remarked in its appeal judgment that defendant's (the present petitioner's) evidence of *enjoyment* was equally weak, is immaterial.

The continuance of the attachment is illegal and it should be released at once.

S.N/R.K.

Ordered accordingly.

A. I. R. 1916 Madras 507 (2)

KUMARASWAMI SASTRI, J.

Ambalavana Pandara Sannadhi—Plaintiff—Petitioner.

v.

Kuppachi Janaki Ammal—Defendant—Respondent.

Civil Revn. Petn. No. 828 of 1913, decided on 27th October, 1914, against the order of Sub-Judge, Tinnevelly, in S. C. Suit No. 2102 of 1912.

Evidence Act (1 of 1872), S. 63—Letter containing translation of grant is not admissible under S. 63.

The translation of a grant contained in a letter from one official to another does not come within the provisions of S 63 of the Evidence Act and so cannot be admitted as secondary evidence of the grant. A I. R. (1915) Mad. 201; A. I. R. 1915 Mad. 738, Ref. to. [P. 508, C. 1.]

S. Muthiah Mudaliar—for Petitioner.

S. Ramasami Aiyar—for Respondent.

Judgment.—The only question is whether the petitioner is the holder of both the *varams*, so as to take the case out of the Estates Land Act and confer jurisdiction on Civil Courts. There can be little doubt that the ordinary presumption is that the grant was only of the *Melvaram*, [*Adusumulli Suryanarayana* v. *Achutta Potana* (1)].

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(1) A. I. R. (1915) Mad. 201=22 I. C. 339.

It is argued that Exhibit D shows that both the *varams* were granted. The original grant is not forthcoming, but Exhibit D, which is a letter from the Collector to the Board, contains a translation of what was produced before him as the original grant. The question is whether the translation contained in a letter from one official to another can be admitted as evidence of the terms of the original grant. It does not come within the provisions of S. 63 of the Indian Evidence Act and so cannot be admitted as secondary evidence

As the Collector simply gives a translation of a document which was produced before him and as there is nothing except his opinion that it "seemed to be" genuine, it cannot be said that the letter Exhibit, D set out any facts within his personal knowledge so as to make it admissible as proof of the terms of the original grant.

It is argued that it must be presumed that the plaintiff was the owner of the *Kudivaram* and that it is for the defendant to show that he was not the owner of the *Kudivaram* at the time of the grant. Reliance has been placed on *Kidambi Jagannathacharyulu* v. *Pidipiti Kutumbarayudu* (2). The Subordinate Judge finds that the *Kudivaram* right was not owned by Ragho Pandit or his successors-in-title in 1808 or subsequently. He presumes that it was not in them before 1808 or at the time of grant. I cannot say he was not entitled to find that the *Kudivaram* was not shown to have been in the grantee at the date of the grant.

The Subordinate Judge is of opinion that Exhibit D does not show that both the *varams* were granted. As I do not think Exhibit D can be used to show the terms of the original grant, it is unnecessary to consider this question.

The petition fails and is dismissed with costs.

S. N./R. K.

Petition dismissed.

(2) A. I. R. 1915 Mad. 738=(25) 25 I.C. 891.

A. I. R. 1916 Madras 508

SANKARAN NAIR AND OLDFIELD, JJ.

Veerappa Chetty and *another*—Defendants—Appellants.

v.

Chidambaram Chetty and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 185 of 1912, decided on 10th December, 1914, against the decree of Sub-Judge, Ramnad in Original Suit No. 43 of 1911.

Limitation Act (9 of 1908), S. 20—Even partner in charge of business must be specially authorised to bind others by payment or acknowledgment.

The mere fact of a partner being in charge of a branch of the partnership business does not authorise him to bind the firm by a payment or acknowledgment. He must be specially authorised to do so in order to bring the payment within S. 20. [P. 509, C. 1.]

K. V. Krishnasawmi Aiyar—for Appellants.

T. R. Venkatarama Sastri—for Respondents.

Judgment.—One objection to the decree under appeal relates only to the case of the 6th defendant. He has been impleaded as the 5th defendant's son and contends that he cannot be held liable for a claim against his father, which originated in the transactions of the latter's firm, that firm not being alleged or proved to have carried on a family trade. But the relationship between these two defendants is sufficient to make the 6th defendant liable. The decision in his case must follow that in the 5th defendant's.

On behalf of the 5th defendant there is, *first*, an argument based on Ss. 132 and 133 of the Indian Contract Act and *Rouse* v. *Bradford Banking Company* (1). It is said that, when he left the firm on the 28th June 1909, he became a surety for the payment of the suit debt, the other partners remaining the principal debtors, and that he was discharged by the giving of time to them, when the loan was renewed on the 20th October 1909. This argument is not among the grounds of appeal; nor was it relied on in the lower Court. The plaintiffs deny that the giving of time was a term of the renewal; and it would be necessary to interpret the

(1) (1894) A. C. 586=63 L. J. C. H. 890.

word *thavani* in Exhibit A and the evidence in order to decide whether this was so. In the circumstances and at this stage we cannot allow the point to be taken.

Next the 7th, 8th, and 9th grounds of appeal amount to a contention that the debt sued on was the result of a novation on the 20th October 1902, to which only the partners other than the 5th defendant were parties, and that he was released from liability. But this reference to a fresh loan in paragraphs 7 and 11 of the plaint is insufficient to support this. There is no legal presumption in its favour, and the evidence of the 5th defendant and the 7th defendant renders it improbable. We find against it.

Lastly, as to limitation. The suit was brought on the 25th January 1911 and is out of time, unless the plaintiffs show that a cause of action is available within three years before that date. No doubt they relied in their plaint and (so far as appears) at the trial only on a payment of interest by the 7th defendant in connection with the renewal of the 20th October 1909, that is, after the 5th defendant had left the firm; and the latter accordingly has argued that the former was not his agent duly authorized on this behalf with reference to S. 20 of the Limitation Act. Here, however, the plaintiffs have pointed out that a payment of interest on the 28th May 1908 is allowed for in the schedule attached to the plaint. That date is before the 5th defendant retired, but within three years of the institution of proceedings. The 5th defendant took no exception to the plaint allegation of this payment in his written statement and, having accepted it there for one purpose, cannot be heard to deny it here for another. If S. 20 is applicable to it, the suit must be held in time.

It is urged, however, that S. 20 is inapplicable, because the payment was made by the 7th defendant and it is not shown that he was the agent duly authorized in this behalf of his partners, including the 5th defendant. Even if he was, as is alleged, in charge of a Burma branch of the partnership business and was himself a partner, that alone will not justify the presumption that he was authorized to bind the firm by a payment or acknowledgment: *Sheik Mohideen Sahib* v. *Official Assignee* (2). The question of limitation was raised clearly by the 5th defendant's written statement and the issues, and the plaintiffs were bound to adduce everything necessary for its decision. The learned Subordinate Judge, however, does not appear to have considered this aspect of it. We must call for a finding on the issue:—"Did the 7th defendant make the payment of the 28th May 1908 as the agent duly authorized on that behalf of the 5th defendant?" Fresh evidence may be taken. The finding should be submitted within six weeks from this date. Ten days will be allowed for filing objections.

In pursuance of the order contained in the above judgment, the Subordinate Judge of Ramnad submitted the following.

Finding.—In this case I have been asked by the High Court to submit a finding on the following issue:—

"Did the 7th defendant make the payment of the 28th May 1908 as the agent duly authorized on that behalf of the 5th defendant?"

2. The Vakil for the 5th defendant contended that the payment said to have been made on 28th May 1908 had also to be proved, but as the issue did not warrant this, I ruled that this matter could not be gone into. He wanted me to receive the copy of the plaint served on his client, and I have done so.

3. The 7th defendant was a partner in the K. A. L. T. firm on 28th May 1908 and was also the agent of the firm on that date. No power-of-attorney was given to him by the other partners. Evidence was let in on the side of plaintiffs, to prove that such agents had power to borrow loans, to make payments to save limitation, and to acknowledge debts; and that these acts of theirs bound their principals. The 5th defendant in his evidence admits that during his agency the 7th defendant had dealings with 10 to 15 Chetti firms, and that he borrowed over and above the sum covered by the Adathi letters given to him. The 5th defendant separated from the K. A. L. T. firm in Soumya Ani and the other partners of the firm continued business under the agency of the 7th defendant. The

(2) (1912) 35 Mad. 142; 11 I. C. 332.

5th defendant admits that in this capacity the 7th defendant executed a pro-note for Rs. 7,500-0-0 to the N. P. A. K. firm ; that he was present then and got the 8th defendant to execute the pro-note ; that the 7th defendant alone signed the pro-note on behalf of the K. A. L. T. firm ; and that the pro-note was binding on all the partners of the K. A. L. T. firm.

The 5th defendant before and after leaving the K. A. L. T. firm was a partner in the O. R. M. M. S. P. S. V. firm, and in discharge of a debt of Rs. 10,000-0-0 and odd due by the K. A. L. T. firm to the O. R. M. M. S. P. S. V. firm, he (5th defendant) got the 7th defendant as agent of the K. A. L. T. firm to assign two debts due to the K. A. L. T. firm. He says in his evidence that this assignment was binding on the other partners. Thus it is admitted that the 7th defendant continued as agent of the K. A. L. T. firm, after the 5th defendant left it ; that no power-of-attorney was given to him ; and that pro-notes and assignment-deeds executed by him on behalf of the K. A. L. T. firm were binding on the other partners. Before the date 5th defendant left the K.A.L.T. firm, the same 7th defendant was agent of the firm ; and yet the 5th defendant says that he had then no authority to do acts binding on the other partners. The 7th defendant was the managing partner, and the other partners were not at the place at which business was being carried on. The witnesses called on plaintiffs' side prove that partner agents without power-of-attorney can make payments to bind the other partners. What they say is corroborated by 5th defendant's own acts. I, therefore, find that the payment in question was made by 7th defendant as the agent, duly authorised in that behalf, of 5th defendant.

This appeal coming on this day for final hearing after the return of the finding upon the issue referred by this Court for trial, the Court delivered the following.

Judgment.—We accept the finding and dismiss the appeal with costs.

S N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 510

OLDFIELD AND NAPIER, JJ.

Mootha and *others*—Defendants – Appellants.

v.

Kandam Vittil Sankunni Nair and *another*—Plaintiffs—Respondents.

Appeal No. 97 of 1912, decided on 16th December, 1914, against the Appellate Order of Dist., Judge, South Malabar, in Appeal Suit No. 216 of 1911.

Limitation Act (9 of 1908), Art. 182—Execution Application of mortgage-decree wrongly returned under O. 21, R. 14, Civil P. C., though not represented is step in-aid.

An application for execution of a mortgage-decree for sale, wrongly returned for want of a certificate under S. 238 of the Civil Procedure Code, 1882, although not re-presented is a step-in-aid of execution within the meaning of Article 182 of Schedule I of the Limitation Act.

[P. 510, C. 2.]

A. Sundaram—for Appellants.

C. Madhavan Nair—for Respondents.

Judgment.—The question is whether Execution Petition No. 761 of 1905 was a step-in-aid of execution in accordance with law. It is urged by the appellants that it was not so, because it was returned for want of a certificate under S. 238 of the Code of Civil Procedure then in force and was not re-presented. The decree under execution was, however, one for sale on a mortgage, and no attachment of the mortgaged property was necessary, S. 238 applies only to petitions for attachment. The Court was, therefore, wrong in returning the execution petition as defective. The petition not having been defective and the failure to present it again after its return being, therefore, immaterial, it must be held to have been a step-in-aid of execution in accordance with law.

The appeal is not pressed with reference to the application dated 6th February, 1903.

The appeal against appellate order is, therefore, dismissed with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 511

WALLIS, C. J., AND TYABJI, J.

(Devarasu) Venkatachala Dwaraka Nadha Rao—Plaintiff—Appellant.

v.

(Devarasu) Venkatarao Pantulu and *others*—Defendants—Respondents.

First Appeal No. 119 of 1913, decided on 11th March, 1915, against the decree of Dist., Judge, Kistna, in Original Suit No. 2 of 1912.

(a) Hindu Law—Partition—No partition by metes and bounds but members divided in status—They are tenants-in-common—Possession of one would be presumed to be for others unless contrary proved—Adverse possession.

Where the members of a joint undivided Hindu family are divided in status, but do not effect a division by metes and bounds, they are tenants-in-common and the possession of one such tenant enures to the benefit of another, unless such another is shown to have renounced his share of the property in possession of the tenants-in-common or there has been something amounting to his ouster. [P 511, C. 2.]

(b) Limitation Act (9 of 1908), Art. 127—No exclusion from joint family property without ouster.

Where no ouster is proved there cannot be said to be an "exclusion" from joint family property within the meaning of Article 127, 11 Bom. 216. diss. from; 5 I C. 924; 24 Mad. 441; 30 Mad. 201, Foll. [P. 511, C. 2.]

(c) Hindu Law—Partition—Co-parcener erecting his own house on site jointly owned—Decree for payment of price to others would be proper.

Where one of the members of a co-parcenary was shown to be in possession of the house site and he erected upon it a superstructure, the proper decree to be passed is to allow him to retain the house site and direct him to pay its price to the other co-sharer who claims a share in the house site alone. [P. 512, C. 1.]

V. Ramadoss—for Appellant.

P. Nagabhushanam—for Respondents.

Wallis, C. J.—In this case the plaintiff appeals from a decision of the District Judge in a partition suit refusing him a share of a certain site on which the family house formerly stood. The family house was washed away by the great cyclone in the sixties and another house was subsequently constructed by the defendants. The plaintiff does not claim any share in the superstructure, but claims that in the partition he is entitled to a share of the site.

The District Judge has relied on a variety of circumstances showing that the plaintiffs had abandoned their right. The proper principle to start with, in our opinion, is that assuming, as found by the District Judge, that shortly after the cyclone the parties became divided in status, yet that until there was a partition by metes and bounds they would be in possession as tenants-in-common of what had been the joint family property, and with regard to the tenants-in-common the presumption is that the possession of one is the possession of all, and, therefore, the possession of the defendants would enure for the benefit of the plaintiff at any rate, unless it were shown either that the plaintiff had renounced his share of the property in possession of the tenants-in-common or possibly that there had been something amounting to ouster.

Now looking at the case from this point of view, there is oral evidence of three witnesses, who say they remember long ago that the plaintiff's grandfather said that he renounced his share of the family house. This is not the evidence upon which the District Judge has acted in arriving at the finding he has arrived at and we do not think it is evidence on which it would be safe to act, and, therefore, it comes to this,—that as there is no evidence of anything that could be considered as ouster, the possession of the defendants must all along be considered to have been the possession of their tenants-in-common.

Then it is said that the suit is barred by limitation under Article 127 of the Limitation Act. But if the possession of the defendants is considered to be the possession of the plaintiff, it cannot be said that there has been exclusion of the plaintiff within the meaning of the Article. A case to the contrary has been cited, *Ramachandra Narayan* v. *Narayan Mahadev* (1), that the exclusion of the plaintiff within the meaning of the Article should be presumed by the defendants having been in possession. But as observed by Benson and Krishnasawmi Iyer, JJ., in *Sammantha Gramany* v. *Devasikamany Gramany* (2), the observations of West, J., in that case have not been accepted as a sound interpretation of Article 127 in this Court, citing *Sellam* v. *Chinnammal* (3) and *Dhoorjetti Sub-*

(1) (1887) 11 Bom 216.
(2) (1910) 5 I. C. 924.
(3) (1901) 24 Mad. 441.

bayya v. *Doorjetti Venkayya* (4). We are, therefore, not prepared to follow those observations and we hold that on the evidence here, there is nothing to show that the plaintiff was in law excluded within the meaning of the Article. As, however, the defendants have been allowed to occupy this site for so long and as the relations of the parties do not appear to be very good, we think it will be best to direct that in the final decree the whole site should be allotted to the defendants and that, as now agreed, Rs. 388 should be paid by the defendants to the plaintiff in lieu of the plaintiff's share of the house and site.

With regard to costs, we think that as there was dispute about this house site the plaintiff was obliged to bring his suit and as he was obliged to bring his suit, he was obliged to include the whole of the joint family properties, and that each party should bear his own costs in the Court below. Both parties should pay and receive proportionate costs of this appeal.

Tyabji, J.—I agree.

S. N./R. K.

Appeal partly allowed.

(4) (1907) 30 Mad. 201.

A. I. R. 1916 Madras 512 (1)

KUMARASWAMI SASTRI, J.

Lakshmi Ammal—Plaintiff—Petitioner.

v.

Ramaswamy Iyengar—Defendant—Respondent.

Civil Rev. Pet. No. 35 of 1914, decided on 27th October, 1914, against the decree of Sub-Judge, Madura, in S. C. Suit No. 2607 of 1913, dated 29th October, 1913.

Limitation Act (9 of 1908), S. 19—Endorsement even without actual payment is good as acknowledgement if so intended.

Where an endorsement of payment of money is relied on as an acknowledgment of liability under S. 19 of the Limitation Act, the fact that no money was paid on that date does not make the endorsement inoperative if it was the intention of the parties that it should be treated as such. [P. 512, C. 2.]

C. S. Venkatachariar—for Petitioner.

R. Rangasamy Aiyangar—for Respondent.

Judgment.—The defendant admits on his evidence that he made the endorsement with a view to keep the document alive. The endorsement runs as follows: "Received towards interest of this promissory note Rs. 18." The Subordinate Judge finds that no money was actually paid and I see no reason to differ from him. It is alleged that Rs. 18 was paid in adjustment of house rent, but this was never set up in the lower Court.

The next question is whether the endorsement is sufficient as an acknowledgment of liability. In Appeal No. 124 of 1911 it was held that an acknowledgment that ran as follows: "In respect of the *mustajari* lease * * * Visvanadha Santo sent Rs. 20 * * * the same should be credited to the *chitta* (account) and receipt granted," was a sufficient acknowledgment of liability.

In Second Appeal No. 666 of 1913, their Lordships following the previous decision held that an entry in the terms, "paid in respect of this note," was sufficient acknowledgment of liability. I am bound to follow the above decision whatever my own views might be. The fact that no money was actually paid does not make the endorsement inoperative as an acknowledgment if it was the intention of the parties that it should be treated as one.

I reverse the decree of the Subordinate Judge and remand the suit for disposal on the other issue. Costs will abide and follow the result.

S.N./R.K.

Decree reversed.

A. I. R. 1916 Madras 512 (2)

BAKEWELL, J.

Alamelammal—Plaintiff.

v.

P. N. K. Suryaprakasaroya Mudaliar—Defendant.

Original Civil Suit No. 64 of 1914, decided on 22nd September, 1915.

Succession Act (10 of 1865), S. 187—Person claiming under will must follow S. 187, in proving execution—Order for probate was passed but no probate issued for want of stamp—Legatee must establish title by evidence required by S. 187.

A party claiming an interest under a will must prove the execution of the document and its terms by the particular procedure prescribed by S. 187 of the Succession Act. 38 Mad. 474 foll. [P. 514, C. 1.]

Where, therefore, in a suit by the testator's widow against his executor, it appeared that the defendant did apply for Probate and that the fiat of the Judge was obtained, but that the actual grant had not been issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act:

Held, that, as the plaintiff claimed as heir of a legatee, she was under S. 187 of the Succession Act in the position of a legatee and must establish her title by production of the evidence required by the section in order to be able to maintain the suit. 17 Cal. 347 (P. C.) dist. [P. 514, C. 1.]

C. P. Ramaswami Aiyar and *N. Chandrasekhara Aiyar*—for Plaintiff.

V. V. Srinivasa Aiyangar—for Defendant.

Judgment.—The plaint in this suit alleges that the husband of the plaintiff died in 1911, possessed of certain properties and having made a will appointing the defendant as his executor, who entered into possession and management of the properties immediately after the testator's death but has taken no steps to obtain Probate of the will. It alleges various acts of mismanagement by the defendant and that the plaintiff is interested as the mother of the testator's son, who died subsequently to the testator and to whose interest the plaintiff has succeeded as heir. The prayer of the plaint is that the defendant may be directed to apply for Probate of the will, that he may be ordered to account for the administration of the estate of the deceased and the moneys collected by him or that ought to have been collected by him but for his wilful default or negligence, and that an account may be taken of the estate and the same be duly administered under the orders of this Court.

It is stated that the defendant did apply for Probate and that the fiat of the Judge was obtained upon his application, but that the actual grant has not been issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act, 1870. The will is one to which the Probate and Administration Act and the Hindu Wills Act apply, and, therefore, the case is governed by S. 187 of the Indian Succession Act, which applies to wills of Hindus under the Hindu Wills Act. In the first place, I think that the fiat of the Judge upon the defendant's petition can only be read as an order that Probate shall issue to the petitioner upon his complying with the statutory provisions and the rules of the Court. One of the statutory provisions with which the petitioner must comply is that he must bring in the necessary stamps. S. 4 of the Court Fees Act directs that no document of the kind specified in the Schedules to the Act shall be received or furnished by any of the High Courts unless the prescribed fees have been paid.

The decision of their Lordships of the Privy Council reported as *Mungniram Marwari* v. *Gursahai Nand* (1) is strongly relied upon by the learned Vakil for the plaintiff as showing that the order of the Court is sufficient without an issue of the actual grant. But it is clear from the observations of their Lordships at page 357 that they were interpreting a particular Act—Act XL of 1858—which was passed prior to the Court Fees Act of 1870—and that they disregarded the latter Act in putting a construction upon the former. The decision may also be distinguished on the ground that in the present case, there has been no actual order for the issue of Probate; and also the point in that case was as to whether a minor had been properly represented or not and their Lordships held that he was, as a matter of fact, represented in the proceedings and they refused to treat them as invalid merely because the formal order had not been carried out. I do not intend to discuss the English cases which have been cited by the learned Vakil for the plaintiff. They relate to cases of executors *de son tort* in which the Court has evidently strained its powers in order to prevent misapplication of the assets of a testator. I do not think that it is useful to refer to cases decided under a totally different system from that which obtains in India and under Statutes different in wording.

The term "Probate" is defined in S. 3 of the Probate and Administration Act as "the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administra-

(1) (1890) 17 Cal. 347=16 I.A. 195 (P.C.).

tion to the estate of the testator," and S. 187 of the Indian Succession Act provides that, "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted Probate of the will under which the right is claimed, or shall have granted Letters of Administration under S. 180." The words, I think, are perfectly plain, and the intention of the Legislature is clear that the party claiming an interest under a will must prove the execution of the document and its terms by the particular procedure which has been laid down by the Legislature. *Lakshmamma* v. *Ratnamma* (2) supports this construction. It is not sufficient if the actual document be produced in the suit and the plaintiff prove it in the way in which ordinary documents are proved; that is what the plaintiff apparently sought to do in this case to go into Court and to put the document in as an ordinary exhibit. The plaintiff claims as heir of a legatee, and is, therefore, under the section only in the position of legatee, and I hold that she must establish her title by production of the evidence required by the section, that is, a grant of Probate issued by a Court of competent jurisdiction. On this ground the suit fails and must be dismissed with costs.

S.N./R.K.

Suit dismissed.

(2) (1915) 38 Mad. 474=21 I.C. 698.

A. I. R. 1916 Madras 514

SADASIVA AIYAR AND NAPIER, JJ.

S. Namberumal Chetty—Defendant—Appellant.

v.

Pasumarty Kannia Chetty and *another*—Plaintiffs—Respondents.

Original Side Appeal No. 52 of 1914, decided on 22nd March, 1915, from the decree of Bakewell, J., dated 13th March, 1914.

(a) Will—Formality—Terms already approved—Will need not be read over before signing.

Where the testator approves of the terms embodied by his legal adviser in the final will, it is not necessary that it should be read out to him when he affixes his signature to it. 14 I. C. 550, foll. [P. 515, C. 2.]

(b) Will—Testator must have sound disposing mind to understand dispositions.

It is necessary for the validity of a will that the testator should have a sound disposing mind, that is, sufficient capacity to deal with and appreciate the various dispositions of property to which he is about to affix his signature. [P. 516, C. 1.]

T. R. Venkatarama Sastriar—for Appellant.

Venkatasubba Rao and *Radhakrishnayya*—for Respondents.

Sadasiva Aiyar, J.—The caveator-defendant is the appellant. The respondents are the two executors mentioned in the will of the late K. Audikesavulu Chetty who died in George Town, Madras, on 21st July, 1913 at about 10 P.M. The will is dated 20th July, 1913. The Probate was granted to the respondents by the trial Judge on the following findings: (*a*) that the testator actively approved of the draft will, (Exhibit C); (*b*) that he signed the fair copy, Exhibit A, with the intention of making his will and (*c*) that he was of sound and disposing mind both when he approved of the draft and when he signed the will.

The contention in appeal is that he was not of a sound and disposing state of mind when the draft (Exhibit C) was read out to him, and when the fair will (Exhibit A) was signed by him and that, therefore, the will, Exhibit A, was not his last will and testament.

As regards the testator's approval of the terms embodied in Exhibit C, four witnesses have been examined on the plaintiffs' side. The 1st witness is a Vakil of this Court of some standing and had been the testator's legal adviser for about ten years before the testator's death. He says "Exhibit C was read out to the testator at 3.30 P.M. On several topics we had discussions. He quite understood it. I spoke to the testator and he answered my questions. He was not sleepy or drowsy." (The memorandum of the notes of the evidence omits the word 'not' by inadvertence in the last sentence as also in two other places in the notes as we ascertained from the learned trial Judge.) "I heard his voice well and could understand what he said. He understood the will."

The next witness is Mr. Radhakrishna Aiyar, who is another practising Vakil of this Court. He proves that the testator was of sound mind, that there was a

discussion with the testator before the terms were finally settled, that the draft (Exhibit C) was fully read over to the testator, that there were alterations made in it at the testator's instance, that the testator understood perfectly that he was making his will and disposing of his property and that he was even anxious to do so. The evidence of these two respectable witnesses is corroborated by the memorandum which they prudently prepared on the date of the will (See the memo. (Exhibit D). The draft will (B) given to them by the testator at about 9-30 A. M., on that day to be their guide in the preparation of the will differs, no doubt, in several details from the final draft (C), but Exhibit D shows that the testator's instructions were taken as regards many of the alterations and the evidence of the plaintiffs' witnesses Nos. 1, 2 and 4 almost conclusively shows that the final draft (C) was fully understood in all its details by the testator and approved of by him before it was fair-copied as Exhibit A. Mr. T. R. Venkatarama Sastriar, for the appellant, argued that the memorandum (D) does not explain 8 or 9 of the differences between the terms of disposition in Exhibits B and C. As regards most of these differences none of the three witnesses for the plaintiff above-mentioned was cross-examined, and as they are positive that the terms of Exhibit C were fully understood and approved by the testator while he was of sound and disposing mind and as it appears from the evidence that the plaintiffs' witnesses Nos. 1 and 4 were going from the upstairs room of the testator's house to the downstairs room for consultation on doubtful points with the testator (who was lying ill in bed downstairs) while the draft (Exhibit C) was being prepared, I do not think that the evidence of these witnesses is, in any way, weakened by their not having voluntarily expanded their statements by declaring expressly that these differences in some matters of detail between Exhibits B and C were also known to the testator and were approved of by him. Another respectable witness, Parthasarathy Chetty (plaintiffs' 3rd witness), who attested the will also speaks to the testator having been of sound and disposing mind at the time of the execution of Exhibit A. I think the evidence on the plaintiffs' side is very strong, especially as the defendant admits the fact of the execution of the will and he does not venture to state in his evidence that the testator was not of sound and disposing mind when he executed the will. On the other hand he said in cross-examination: "If I am allowed to join in the application for Probate and admitted as a partner in the business, I have no objection to the will." The testator not only signed the will (Exhibit A) at the end, but also initialled at the bottom of every folio.

As regards the evidence of the quack doctor (D. W. No. 3) he is clearly a perjured witness, as he had admitted in Exhibit F, a letter written by him about three months after the execution of the will, that the testator was able to clearly express his thoughts in the matter of the powers of the trustees, etc., whereas in his evidence he had the hardihood to say that the testator was, for all practical purposes, unconscious when he signed the will. Some stress was laid on the statement of Mr. Venkatasubba Rao in his evidence that the testator did not hear the will, Exhibit A, read out before he signed it, though he had approved of the draft, Exhibit C. The judgment of Sir Arnold White, C.J., in *Venkata Rangavulu* v. *Baggiammal* (1) shows that if the testator had approved of the terms embodied by his legal adviser in the final will, it is not necessary that those terms as so embodied in the final will should even have been present in his mind when he signed the final will. The *caveat* put in by the appellant was clearly frivolous and vexatious and I would dismiss the appeal with costs.

Napier, J.—I entirely agree. In my opinion when the case came on for trial it was found to be practically undefended. The defence there consisted in two allegations; one, that certain clauses were not brought to the notice of or approved by the testator, and the other, that the testator was not of a sound and disposing mind. The caveator in his evidence as the 2nd witness for the defence made no attempt to support either of these allegations. The 3rd witness for the defence, who has been characterized as a perjured witness by my learned brother, endeavoured to support the second

(1) (1912) 14 I.C. 550.

allegation, but his evidence was worthless.

The memorandum of appeal contains a fresh charge of fraud against the friends of the deceased and the legal gentlemen who prepared the will. But this contention obviously could not be put forward at this stage.

The denial that the document was the will of the testator in that some of its provisions were not known to him, was not pressed at the hearing for some reason which is not apparent to me. But the learned Vakil for the appellant sought to establish that the testator was not of a disposing mind by pointing out differences between the old draft will, Exhibit B, given by the deceased to the Vakils as the basis to work on and the final draft, Exhibit C, and by arguing that the testator did not know of the alterations. I am clear that this argument is not open to the appellant on this plea. It raises an entirely different defence expressly abandoned. The question whether the testator was of a sound and disposing mind is one which goes to his capacity to understand, and not to the fact whether certain provisions were or were not assented to by him. In *Shunmugaroya Mudaliar* v. *Manikka Mudaliar* (2) Boddam, J., in a case where the defence was that the testator was not of a sound and disposing mind, stated the law as follows:—"In these circumstances I have to be satisfied that the state of mind of the deceased man at the time the will was executed was such that he was capable of making the will propounded." The case having gone to the Privy Council, the Board stated that the learned Judge correctly laid down for his own guidance the essentials of a sound and disposing mind. In Halsbury's Laws of England, Volume 28, paragraph 1047, the proposition is stated as follows:—"It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, words which time out of mind have been held to mean sound, disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature." Those are the limits within which the evidence on such an issue as this must be confined; and it was not, therefore, in my opinion, open to the appellant to criticize the evidence for the purpose of showing that in fact some provisions were not explained to the testator. The capacity of the testator's mind is amply established by the evidence of the plaintiffs' 1st witness, the Vakil who drew the will; for he speaks to having discussed several provisions with the testator and having made several alterations at the testator's request. This evidence stands uncontradicted and is, in my opinion, conclusive.

I, therefore, agree with my learned brother that this appeal should be dismissed with costs.

S.N./R.K.

Appeal dismissed.

(z) (1909) 32 Mad. 400=3 I. C. 799 (P. C.).

A. I. R. 1916 Madras 516

SESHAGIRI AIYAR, J.

In re Kanakasabhai and *another*—Accused—Petitioners.

Criminal Rev. Case No. 607 of 1915, Criminal Rev. Pet. No. 487 of 1915 and Criminal Misc. Pet No. 424 of 1915, decided on 17th September, 1915, from the order of Chief Presdy. Magte., Egmore, in Calendar Case No. 12188 of 1915.

Criminal P. C. (1898), S. 439—Revision—After dismissal on merits of criminal revision no fresh petition in revision lies on same grounds.

Once a criminal revision petition is dismissed on the merits by a High Court, the rules of equity, justice and good conscience require that no other petition on the same matter should lie. 16 I. C. 518 foll. [P. 517, C. 1.]

K. Ramachandran and *T. Gopala Desikachary*—for Petitioners.

Order.—In this case, an application was made to me on 14th September, 1915 while I was sitting in the Admission Court to admit a criminal revision petition and to release the accused on bail. I granted both the prayers. Immediately after and before the order was transcribed, it was brought to my notice that Sir William Ayling, J., had the matter before him some days back and that he dismissed the petition. This was not brought to my notice as it ought to have been when I passed orders. I am asked to treat the dismissal by Ayling, J., as

one for default of appearance. One of the Vakils was present before the learned Judge and though he says he represented his inability to go on with the case as the papers were with the other Vakil, I see no reason to think that Ayling, J., did not deal with the petition on its merits. The decision in *Ranga Row* v. *Emperor* (1) shows that the High Court has no power to restore a petition once dismissed for default. It is argued that that decision does not preclude the filing of a fresh petition for the same relief. Although the principle of *res judicata* is not applicable to criminal cases, I think that on grounds of justice and equity, Courts should discourage the agitation of the same matter once again before another Judge. If the dismissed petition cannot be restored, there is stronger ground for holding that a new petition will not lie. There has been no considered decision on the question. The fact that notice was issued in Criminal Revision Case No. 126 of 1914 on a similar application is not an indication that the learned Judge came to the conclusion that such a petition can be entertained. Moreover, I think that in this case Ayling, J., must be deemed to have disposed of the case on the merits. I, therefore, refuse to admit the petition and to grant bail.

The petitions are dismissed.

S. N./R. K.

Petitions dismissed.

(1) (1912) 16 I. C. 518.

A. I. R. 1916 Madras 517

TYABJI, J.

Govindasami Pillai —Defendant—Petitioner.

v.

Ramasami Aiyar and *another*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 476 of 1914, decided on 23rd September, 1915, from the Judgment and decree of Sub-Judge., Kumbakonam, in Sm. C. Suit No. 1480 of 1913.

(a) Registration Act (16 of 1908), S. 49—Unregistered lease is not admissible to prove rent.

An unregistered document purporting to be a lease of immovable property is not admissible in evidence even to prove the rent agreed to be paid.

[P. 517, C. 2.]

(b) Transfer of Property Act (4 of 1882), Ss. 3 and 6 (e)—Claim for rent for use and occupation is transferable.

The right to claim occupation rent is not a mere right to sue incapable of being transferred, but an actionable claim which can be transferred Consequently, a vendee of a land is entitled to recover the occupation rent due on it even prior to the date of the conveyance.

Metropolitan Railway Co. v. *Defries*, (1877) 2 Q. B. D. 387 ; foll. *Anker* v. *Franklin*, (1880) 43 L. T. 317 ; ref. to.

[P. 518, C. 2 & P. 519, C. 2.]

V. C. Seshachariar - for Petitioner.

N. S. Rangaswami Aiyangar for *T. Narasimha Aiyangar*—for Respondents.

Judgment.—The question in this petition is whether the plaintiffs are entitled to recover a sum of Rs. 290 from the defendant for the use and occupation of certain lands.

There was a document between the parties purporting to be a lease but inasmuch as the agreement was reduced to writing but not registered, it could not affect the immovable property by reason of Ss. 49 and 17 (*d*) of the Indian Registration Act, 16 of 1908.

The learned Subordinate Judge has, however, proceeded on the basis that, though this document is inadmissible for want of registration to prove the leasing or the tenants' right to the term in it, yet it "is admissible to prove the rent agreed to be paid." In my opinion this is an erroneous view of the law. S. 17 (*d*) of the Indian Registration Act provides that "leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent" shall be registered ; and S. 49 provides that "no document required by S. 17 to be registered shall affect any immovable property comprised therein .....unless it has been registered." The document Exhibit A, therefore, which purports to be a lease of the property, cannot affect the immovable property. It has been argued before me that, if the document is looked at for the purposes of fixing the rent between the parties, it does not affect the property and, therefore, it may be operative in this regard notwithstanding S. 49. I cannot accede to this argument. When there is a lease with reference to immovable property, it seems to me that the terms on which the property is leased "affect" that property within the meaning of S. 49, and the rent reserved

in the lease is the most important of the terms.

In my view, therefore, the Subordinate Judge's finding on the question of the amount of occupation rent due from the defendant to the plaintiffs is vitiated by the error. I find, however, that he refers to the terms of Exhibit B, which is a previous registered lease of half the land now in question. The rent fixed under that deed was Rs. 130 per annum, and the Subordinate Judge points out that if that document were taken as the basis for fixing the occupation rent in respect of the whole land now in question, the defendant would be liable to pay Rs. 260 per annum. I take it, therefore, that the Subordinate Judge indicates, with sufficient precision for my present purpose, that in his opinion the claim of Rs. 290 made by the plaintiffs is a fair claim. I agree with him ; and I think it would be futile to call for a fresh finding on the point.

The next point argued before me is whether the plaintiffs have become entitled to this sum, assuming it to be a fair occupation rent. It is argued before me that they are not entitled, because the plaintiffs became the owners of the property in question only by a sale in their favour, dated the 23rd October, 1912, and that a part of the sum which is decreed to them as occupation rent became due prior to their sale-deed, that the claim for occupation rent is not such a claim as can be validly transferred and that when such a claim is purported to be transferred, it is of no effect and does not empower the alleged transferee to claim it.

The sale-deed, Exhibit E, in favour of the plaintiffs, provides that the plaintiffs shall hold and enjoy the said properties with the income accruing therefrom from the date of Exhibit D, the 8th December, 1911, on which date the plaintiffs' vendor purchased the property.

I must here refer to a matter to which neither my attention nor the attention of the Lower Court was drawn and which is not taken in the grounds of revision. It is this that the claim is for rent for the period between 1st September, 1911 to 14th November 1912 and it has been allowed for that period. But the plaintiffs' sale-deed empowers them to recover the rent only as from 8th December, 1911. In spite of the fact that this point was not taken by the defendant, I considered it right to draw the attention of the Pleaders to it. Mr. N. S. Rangaswami Iyengar, who appeared for the plaintiffs, expressed his willingness to have a deduction made in the claim in respect of the period from 1st September, 1911 to 8th December, 1911, but said that as during this period also, his clients had a $\frac{1}{4}$th share in the property, they should be allowed to recover $\frac{1}{4}$th of the proportionate rent for that period. This offer, which I am informed, means a deduction of Rs. 48-12-0 from the decree amount, was not accepted. I do not think that I ought to interfere in this matter without the consent of the parties. Moreover, it seems to me that the calculation of the occupation rent is on a rough basis not too favourable to the plaintiffs, and I am not prepared to hold that on a fair basis, the deduction for the period between 1st September and 1st December ought necessarily to be proportionate or that the amount fixed for the period claimed would not be a fair amount for the period between 8th December and 14th November, 1912.

I proceed to consider the question with reference to the period after the date of Exhibit D.

The argument for the petitioner before me has been that the terms of the Transfer of Property Act, IV of 1882, S. 6 (*e*) prohibit the transfer to the plaintiffs of any right to recover the occupation rent due from the defendant prior to the sale-deed in their favour, namely, prior to the 23rd October, 1912.

The question shortly, therefore, is whether the right to claim occupation rent is :

(1) "a mere right to sue" incapable of being transferred, or

(2) such an actionable claim as is defined in S. 3 of the Transfer of Property Act, which can be transferred under the sale-deed, and by being so transferred, empower the vendee to recover the occupation rent due on the land prior to the date of the conveyance.

In the *Metropolitan Railway Company* v. *Defries* (1), it was decided by

(1) (1877) 2 Q. B. D. 387=36 L. T. 494.

the Court of Appeal in England, agreeing with the Divisional Court, that where premises are transferred with the rights to recover "all rents and profits", the right to recover occupation rent is also transferred.

In that case, the facts were that the plaintiffs agreed to purchase certain property from the defendants and the purchase was to be completed on the 29th September, 1869, from which time the plaintiffs were to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. The purchase, however, was not as a matter of fact completed until the 13th March, 1876. The defendants had remained in possession, but had paid no rent. It was held that the defendants were liable to pay occupation rent for the period in question. Mr. Seshachariar sought to distinguish the *Metropolitan Railway Company's* case (1), on the ground that the amount that ought to have been allowed for occupation rent was admitted there, whereas in the case before me that amount has had to be determined in the manner mentioned in an earlier part of my judgment. This circumstance seems to me to be quite irrelevant to the real point. The *Metropolitan Railway Company's* case (1) seems to me to be indistinguishable from the present except on one point (which was not taken before me), namely, that the occupation rent claimed there was not for a period prior to the date of the agreement for the sale of the property; but I do not consider that to be an important distinction.

What seems to me to be of substance is that the right to recover occupation rent was considered to follow the title to the property and to be included in the term "rents and profits." If the rent recoverable in respect of the period in question had been not occupation rent, but rent under a valid lease, the plaintiffs would have been entitled to succeed, and it seems to me that the case of *Metropolitan Railway Company* v. *Defries* (1) is authority for the proposition that in this regard, occupation rent is not different from rent due under a lease. The same point seems to have been assumed, though it did not come up for decision, in *Anker* v. *Franklin* (2).

A point was also taken before me that the defendant ought to have the benefit of S. 132 of the Transfer of Property Act. But it was not suggested in the written statement or at the trial in the lower Court that there were any such equities or liabilities as the section contemplates. Mr. Seshachariar took the point for the first time in his grounds, but is not able even now to give any particulars of the equities or liabilities that may be in question. There is no substance, therefore, in this point.

It seems to me for these reasons that the plaintiffs were entitled to recover the amount decreed to them by the Subordinate Judge, and I dismiss the petition with costs.

S.N./R.K.

Petition dismissed.

(2) (1880) 43 L. T. 317 = 44 J. P. 830.

A. I. R. 1916 Madras 519

SESHAGIRI AIYAR AND NAPIER, JJ.

Rangasawmi Aiyangar and *another*—Defendants—Appellants.

v.

Sowri Aiyangar—Plaintiff—Respondent.

Second Appeal No. 803 of 1914, decided on 30th April 1915, against the decree of Tempy. Sub-Judge, Tanjore, in A. S. No. 464 of 1913.

(a) Evidence Act (1 of 1872), S. 92 (a)—Right under Cl. (a) is not confined to plaintiff alone.

Under S. 92, clause (*a*), any fact may be proved which would entitle a person to a decree on the ground of mistake of fact or law, and there is nothing in the section giving such a right to a plaintiff alone. 2 C. W. N. 260; 28 Bom. 420; 30 Mad. 397; and 34 Mad. 51, foll. [P. 520, C. 1 & 2.]

(b) Specific Relief Act (1 of 1877), S. 31 (a)—Property misdescribed—Right of getting rectification of mistake can be used in defence in suit for possession.

Where there is a misdescription of the property sold, the vendee can claim a rectification of the sale-deed under S. 31 (*a*). [P. 520, C. 1.]

Such a right can be used as a shield when possession is sought to be wrested from the party entitled to the rectification, and the fact that he is a defendant does not disable him from setting up the plea which could have availed him as plaintiff. [P. 520, C. 1.]

(c) Evidence Act (1 of 1872), S. 92 (a)—Suit for possession—Plea of misdescription of property sold can be successfully raised.

The combined effect of S. 92, clause (*a*), Evidence Act, 1872, and of S. 31, Specific Relief Act, 1877, is that the defendant can resist a suit on the ground that what was sold to him was different from what the sale-deed contained.

[P. 520, C. 2.]

K. Parthasardhy Aiyangar and *R. Rangachariar* – for Appellants.

T. Narasimha Aiyangar – for Respondent.

Judgment.—This is a suit to recover possession. Plaintiff's case was that he purchased survey No. 92B from the owners in April 1911 and that the defendant is wrongfully in possession of it. The defendant pleaded that the same vendors conveyed to him the property in dispute in 1908 and that although the conveyance (Exhibit II) describes the land sold as survey No. 90B, his vendors intended to sell, and he intended to purchase, only survey No. 92B. He also alleged that he was put in possession of this latter number under the sale-deed.

The issue raised in the case was whether it was survey No. 90B or 92B that was sold to the defendant. The Munsif agreed with the defendant's contention and dismissed the suit. In appeal, the Subordinate Judge held that evidence to prove that what was actually sold was inadmissible under S. 92 of the Evidence Act and decreed the plaintiff's claim.

We think the Subordinate Judge is wrong. The written statement clearly sets up a case of mistake in the description of the property sold. There can be no doubt that on the allegations contained in the written statement, the defendant would be entitled to claim rectification of his sale-deed under S. 31 of the Specific Relief Act. Under S. 92, clause (*a*), any fact may be proved which would entitle any person to any decree on the ground of "mistake of fact or law." Thus, it is clear that if he went to Court as plaintiff, the defendant could have claimed relief by way of injunction against the plaintiff from interfering with his possession and to have his sale-deed rectified. Does the fact that the defendant is resisting the plaintiff's claim disable him from setting up the plea which could have avalied him as plaintiff. We think not. We find nothing in the language of S. 92, clause (*a*), which indicates that its benefit can be invoked only by the plaintiff. In *Mahendra Nath Mukerjee* v. *Jogendra Nath Roy Chaudhry*, (1), it was held that the defendant can protect himself by such a plea. See *Dagdu* v. *Bhana* (2). In this Court it was decided in *Karuppa Gounden* v. *Periathumbi Gounden* (3) and *Mahadeva Aiyar* v. *Gopala Aiyar* (4), that a plaintiff can sue to recover the right property notwithstanding misdescription in his document of title. Reliance was placed in these two cases on the proviso to S. 92. None of these cases have been considered by the Subordinate Judge. It is true that S. 94 has no application as pointed out by him, but the combined effect of S. 92, clause (*a*), and of S. 31 of the Specific Relief Act leaves no room for doubt that the defendant can resist the suit on the ground that what was sold to him was different from what the document described.

Mr. Narasimha Aiyangar contends that on the facts he will be able to show that there was no mistake. We must reverse the decree of the Subordinate Judge and remand the appeal for disposal on the merits. Costs to abide the result.

S.N./R.K.

Appeal allowed ; Suit remanded.

(1) (1898) 2 C. W. N. 260.
(2) (1904) 28 Bom. 420.
(3) (1907) 30 Mad. 397.
(4) (1911) 34 Mad. 51=8 I. C. 390.

A. I. R. 1916 Madras 520

SESHAGIRI AIYAR AND NAPIER, JJ.

Upadhayayulu Yegnanarayana—Plaintiff—Appellant.

v.

Kottalanka Makayya and *others*—Defendants—Respondents.

Appeal No. 59 of 1914, decided on 13th September, 1915, against the Appellate decree of Dist., Judge, Godaveri, in Appl. Suit No. 150 of 1913.

Civil P. C. (5 of 1908), S. 153—Mortgage-decree drawn up as money decree by mistake—Decree can be amended by first Court.

Where a mortgage-decree is wrongly drafted as a money-decree the proper course for an aggrieved party is to apply to the Court which passed the decree for its amendment in order to bring it in conformity with the judgment. An

Appellate Court would not exercise that power when it would be inconvenient to do so. 22 Cal. 859, ref. to. [P. 521, C. 1.]

M. Patanjali Sastry for *P. Narayanamurthi* for Appellant.

V. Ramesam—for Respondents.

Judgment.—The decree-holder has misunderstood both his rights and remedies. The claim was for the assessment paid by the plaintiff, which ought to have been paid by the defendants. In the plaint, the prayer is that the properties in respect of which the revenue was paid, should be held liable.

We understand this prayer as claiming a mortgage-decree in effect. The decretal portion of the judgment gives a mortgage-decree and fixes a date within which the money should be paid. But in drafting the decree, a mistake was made by giving the decree-holder only a charge on the property. The decree-holder, instead of appling to have the decree amended, moved the Court to attach the property treating the decree in his favour as a money-decree. The District Munsif granted the prayer. In appeal, the District Judge, relying on *Aubhoyessury Debee* v. *Gouri Sunkar Panday* (1) held that the plaintiff's only remedy was to sue again to enforce the charge. Apparently, it was not argued before him that the decree was in effect a mortgage-decree. It is conceded by the learned Vakil for the respondents before us that it is open to a Court executing the decree to construe it in the light of the plaint and the judgment. In this view, we think that it was intended to give plaintiff a decree enabling him to bring the property to sale. The proper course was to have applied to the Court which passed the decree to bring the decree into conformity with the judgment. It was argued that we should allow this amendment ourselves. Supposing that we have the power, seeing that the decree was treated by the appellant as a money-decree and also having regard to the fact that the application for sale should be preceded by an application for a decree absolute, we do not think we can comply with the request of the appellant's Vakil. We feel no doubt that the Court of first instance will direct the amendment, which we think ought to be made in the decree. But as the plaintiff has misconceived his remedy, we must dismiss the Civil Miscellaneous Second Appeal with costs; each party will bear his costs in the two Courts below.

S. N./R. K.

Appeal dismissed.

(1) (1895) 22 Cal. 859.

A. I. R. 1916 Madras 521

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Mullapali Taravathil—Petitioner—Appellant.

v.

Gopala Menon and *others*—Respondents.

Civil Misc. Appeal No. 128 of 1914 and Civil Revn. Petn. No. 269 of 1914, decided on 19th April, 1915, from the order of Sub-Judge, Palghat, in Exc. Petn. No. 1319 of 1913.

(a) Civil P. C. (5 of 1908), O. 40, R. 4—Sale of receiver's property in the hands of his legal representative—Proper procedure is execution and not separate suit.

Under O. 40, R. 4, of the Civil Procedure Code the proper procedure to bring to sale the properties of a deceased Receiver in the hands of his legal representatives is by way of execution and not by a separate suit. [P. 522, C. 2.]

(b) Civil P. C. (5 of 1908), O. 40, R. 4—'Property' in R. 4 includes income from property.

The word "property" in O. 40, R. 4, and in the other clauses of the section is synonymous with estate and covers income from the property. [P. 522, C. 1.]

(c) Civil P. C. (5 of 1908), O. 40, R. 4—Scope of R. 4—It applies to case of mis-appropriation also.

O. 40, R. 4, is a residuary provision intended to deal with all cases of loss to the estate not specially provided for and, therefore, applies to a case of misappropriation also. *Jenkins* v. *Briant*, (1834) 7 Sim, 171; *Ludgater* v. *Channell*, (1847) 16 L. J. Ch. 248, ref. to. [P. 522, C. 1.]

P. R. Srinivasa Aiyangar and *G. S. Ramachandra Aiyar*—for Appellant (in 128 of 1914.)

P. R. Srinivasa Aiyangar and *T. R. Ramachandra Aiyar*—for Petitioners (in 269 of 1914.)

J. L. Rosario and *P. Appu Nair*—for Respondents.

Judgment.—One Raman Nair brought a suit against the present appellant to remove him from the *karnavanship*. The first Court directed his removal. Pending the disposal of the appeal against the decree the said Raman Nair was appointed Receiver of the *tarwad* properties and

he gave security for the proper management. The appeal was decided in favour of the *karnavan* in February 1913. Raman Nair, the Receiver, died in April 1913. The present application is by the successful *karnavan* for an order that the properties of the deceased Receiver in the hands of the respondents should be held liable for moneys misappropriated by him. The Subordinate Judge held that although an application of this kind might be entertained against the Receiver if he were alive, it is incompetent against his legal representatives and the proper procedure is to sue the latter in a regular suit. We think this order is wrong.

O. 40, R. 4, provides that where a Receiver had occasioned loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold. Mr. Rosario raises two objections to the applicability of this clause. He contends that the word "property" only refers to what was actually entrusted to the Receiver and not the income derived therefrom. We are unable to agree with him. Property in this and in the other clauses of the section is synonymous with estate. In most cases it is for the collection of the income that Receiver is appointed. We are of opinion that the income from a property entrusted to the charge of a Receiver is covered by the word.

The learned Vakil also urges that by misappropriating the income it cannot be said that the Receiver committed wilful default or negligence. The clause is not very happily phrased. It is a residuary provision and is intended to deal with all cases of loss to the estate not specially provided for. One cannot say that a man who uses for his own benefit the money entrusted to him does not occasion loss by his wilful default. We must overrule this objection also.

The far more serious objection raised was that in a summary proceeding, the legal representatives should not be proceeded against. There is no question of the respondents being executors under the will of the deceased. They are the original legal representatives of the deceased. The provision in R. 4 is that the property of the Receiver should be attached and sold. It does not necessarily involve the conclusion that the Receiver is alive. In S. 50, clause (2) of the Code, where a provision is made for executing the decree against the legal representatives the language employed is "that the property of the deceased in his hand should be liable." We think that the Legislature has advisedly rendered the property liable in O. 40 in order that execution may be levied against it in the hands of the legal representatives. If a suit has to be instituted, the same representatives would have to be impleaded as being in possession of the assets of deceased and we see no reason why the question which can be decided in a suit should not be disposed of in the execution application. Mr. Rosario drew our attention to the cases reported as *Jenkins* v. *Briant* (1) and *Ludgater* v. *Channell* (2), in which it was held that the legal representatives of the defaulting Receiver should not be held liable in summary proceedings. In O. 50, Rr. 15 (*a*) to 24 of the Rules of the Supreme Court, there is no provision directing the recovery of the money against the estate of the Receiver as we have in O. 40 of our Code. We do not think that the cases cited affect the specific provisions of the Code of Civil Procedure. We agree with the learned Vakil that S. 145 has no application. It contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit. The Receiver is not in that position. We think that provisions of R. 4, O. 40, are comprehensive enough to enable execution being had against the legal representatives of the deceased Receiver. We cannot accede to the contention that as the Receiver is an officer of the Court the respondents cannot be his legal representatives. In giving an undertaking to properly manage and in furnishing security in that behalf, he is rendering himself, and is, personally liable and in that capacity the respondents are his legal representatives.

For these reasons we must reverse the order of the Subordinate Judge and direct him to dispose of the petition. Costs will abide the result.

S.N./R.K.

Order reversed.

(1) (1834) 7 Sim. 171=4 L. J. Ch. 2.
(2) (1847) 15 Sim. 479=16 L. J Ch. 248.

A. I. R. 1916 Madras 523

SESHAGIRI AIYAR AND NAPIER, JJ.

Lakshmi Achi—Petitioner—Appellant.

v.

Subbarama Aiyar and *others*—Respondents.

Appeal No. 151 of 1914, decided on 10th March, 1915, against the order of Sub-Judge, Mayavaram, in Insol. Appeal No. 6 of 1914.

(a) Civil P. C. (5 of 1908), O. 20, R. 12—Suit continues until final decree.

Under the Civil Procedure Code of 1908, after the passing of a preliminary decree, the suit is continued until the stage of final decree is reached. 25 Mad. 244; A.I.R.1914 All. 66 (P.C.), 33 All. 264; (P.C), and 27 I. C. 683; dist.

[P. 523, C. 2.]

(b) Civil P.C. (5 of 1908), O. 22, Rr. 3 and 10—Widow of testator is not legal representative of executor—Meaning of "devolution" in R 10 explained—Widow of testator can apply under R. 3—Order under R. 3 is not appealable.

A widow of a deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit. The term "devolution" in O. 22, R. 10 means the devolution of the interest of the person who instituted the suit.

Ferral v. *Curran*, (1899) 2 Ir. R. 470; 33 All. 15; and 27 I. C. 1001, foll. [P. 524, C. 1.]

An application to be brought on record by such a widow could be made only under O. 22, R. 3, and as orders on such applications are not made appealable under O 43, R. 1, no appeal lies from an order rejecting such an application.

[P. 524, C. 2.]

T. Rangachariar and *C. V. Anantha-krishna Iyer*—for Appellant.

S. Srinivasa Aiyangar and *G. S. Rama-chandra Iyer*—for Respondents.

Judgment.—One Arunachalam Chetty died leaving two widows. Prior to his death, he executed a will on the 25th July, 1904. Two persons were appointed executors under it. They brought Original Suit No. 49 of 1911 on the deed of mortgage executed to the deceased testator. One of the executors died before the preliminary decree in the suit was passed, and the other after it. An application was presented by the appellant, the senior widow of the deceased, to continue the suit. It was opposed by the respondent, the junior widow. The Subordinate Judge dismissed the application. This appeal is against that order.

Mr. S. Srinivasa Aiyangar raised the preliminary objection that no appeal lies against the order of the lower Court. The question has been argued very fully before us by the learned Vakils for the appellant and respondent. We have to come to the conclusion that the preliminary objection must be upheld.

Mr. T. Rangachariar's first contention is that after the passing of the preliminary decree in a mortgage suit, the procedure leading up to the final decree is only by way of execution and that consequently his client, the appellant, is entitled to initiate proceedings in that behalf. We are of opinion that this argument is not open to the appellant after the amendment of the Code of Civil Procedure, which by O. 34 now regulates the procedure relating to the execution of mortgage decrees. It was held in *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1) that the preliminary decree passed in a mortgage suit is the only executable decree and that proceedings for obtaining the final decree could be taken only by way of execution. This view was based mainly on the language of S. 89 of the Transfer of Property Act, which says: "the plaintiff or the defendant, as the case may be, may apply to the Court for an *order* absolute for sale of the mortgage property." The recent decision of the Judicial Committee in *Abdul Majid* v. *Jawahir Lal* (2) is in favour of the view taken in the Madras Full Bench case. The use of the word *order* in S. 89, in contradistinction to the word *decree* in S. 88, was responsible for numerous decisions which were not easily reconcilable. The Legislature intervened, and in O. 34 speaks of both the adjudications as decrees (See Rr. 2 and 3). Therefore, after the passing of the preliminary decree, the *suit* is continued until the stage of final decree is reached. It is not by the process of execution that the final decree is obtained. Mr. Rangachariar refers to the explanation to the definition of decree, and argues that when read with S. 47, the proceeding referred to in the Explanation really relates to execution. Had it not been for the deliberate change in the language of O. 34, this contention would have force. The decisions of the Judicial Committee of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (3) and *Munna*

(1) (1902) 25 Mad. 244.
(2) A. I. R. 1914 All. 66=36 All. 350=23 I.C. 649 (P. C.).
(3) (1911) 33 All. 264=9 I. C. 975 (P. C.)

Lal Parruck v. *Sarat Chundra Mukerjee* (4) relate to the language of Ss. 88 and 89 of the Transfer of Property Act, and not to the amended provision of the Code of Civil Procedure. In the former case, Counsel expressly stated that under the Code it would not be possible to argue that the preliminary decree is executable. It was further argued by the learned Vakil that as the preliminary decree relating to possession (under O. 20, R. 12) is executable independently of the final decree as to mesne profits, it follows that a preliminary mortgage decree is executable. A decree for mesne profits is not, strictly speaking the final stage of the decree for possession. They relate to two different rights: and the fact that an exception is made in such cases is not an argument for holding that all preliminary decrees are executable.

Mr. Rangachariar's next contention is that his ciient is a person on whom the estate has devolved upon the death of the executors and that her application must be treated as one falling under O. 22, R. 10, of the Code of Civil Procedure. We were at first inclined to think that the devolution referred to in this rule was of the same character as is referred to in the definition of '*legal representative*' in the Code (S. 2, clause 11). Mr. S. Srinivasa Aiyangar has satisfied us that R. 10 is not open to that interpretation. The term legal representative is used in Rr. 3 and 4 of the Order and does not find a place in R. 10. The plain language of the rule suggests that the devolution of the interest must be that of the plaintiff who has instituted the suit. The words 'assignment' and 'creation' indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit. We think that "devolution" which is by operation of law must also relate to the interest of the party to the suit. Under the corresponding rule in the Judicature Act (O. 17, R. 2,) it was held that where a tenant-for-life who brought the suit died, the remainder-man was not entitled to continue the suit [*Ferrall* v. *Curran* (5)]. The same construction must be adopted with reference to R. 10. The Legislature has provided for cases in which the interest devolving is not that of the deceased plaintiff, but is that of the person whose right of action the deceased plaintiff sought to enforce as representating his estate. Rr. 3 and 4 of O. 22, read with S. 2, clause 11, cover such cases. It is on this principle it has been held that a reversioner can continue the suit instituted by a widow. See *Rikhai Rai* v. *Sheopujan Singh* (6), and *Gandi Ramaswami* v. *Puramsetti Pedamunayya* (7). It has to be noted that the application of the appellant in the lower Court was under R. 3, O. 22. The Legislature has chosen not to give a right of appeal against orders passed under that rule, whereas under O. 43, R. 1 (*l*), orders with reference to R. 10 are appealable. We must, therefore, hold that this appeal is incompetent.

The appellant will pay the costs of the respondent.

S. N./R. K.

Appeal dismissed.

(4) (1915) 27 I. C. 683.
(5) (1899) 2 Ir. R. 470.
(6) (1911) 33 All. 15; 7 I. C. 97.
(7) (1915) 27 I.C. 1001.

A. I. R. 1916 Madras 524

SANKARAN NAIR AND OLDFIELD, JJ.

Narayanan and *others*—Plaintiffs—Appellants.

v.

Rangasami Chetty and *others*—Defendants—Respondents.

Civil Appeal No. 21 of 1913, decided on 3rd February, 1915, against the decree of Sub-Judge, of Ramnad, in O. S. No. 89 of 1911.

Limitation Act (9 of 1908), S. 10, Arts. 62 and 115 –Agreement between real owner and benamidar mortgagee that former should recover amount in latter's name and latter should hold it for former—Suit after three years of recovery by latter held barred under Art. 66—S. 10 of Art. 115 held not applicable as it was neither trust nor breach of contract.

The plaintiff's predecessor obtained a mortgage bond executed *benami* in the name of the defendant's predecessor, on the understanding that the latter should have nothing to do with it and that the former should conduct all necessary proceedings in the latter's name and that after the amount was collected and got into the latter's hand, the latter should hold it at the former's disposal and act according to his directions. This amount was received from the Court at the instance of the latter's Vakil on the 3rd February, 1908, who paid it to the latter on the 10th. The plaintiff filed a suit to recover the amount on the 6th February, 1911:

Held, that the suit was governed by Article 62 and that as it was brought more than three years after the amount was received, it was barred.

Such a suit is neither one to follow trust property within the meaning of S. 10, nor is it a suit for damages for breach of contract under Article 115, as it cannot be said that receipt of money of itself evidences a contract to re-pay without further consideration. [P. 525, C. 1 & 2.]

S. Srinivasa Iyengar—for Appellants.

T. Rangachariar and *Venkatachariar*—for Respondents.

Judgment.—This is an appeal from the decree of the Subordinate Judge, Ramnad, dismissing the plaintiff's suit on the ground that it was barred by limitation.

The plaintiff's case is that Krishnan Chetty, the managing member of his family, obtained the mortgage-bond (Exhibit A) executed *benami* in the name of Siva Chithambaram Chetty, on the understanding that the latter should have nothing to do with it and that Krishnan Chetty should conduct all necessary proceedings in the name of Siva Chithambaram and "that after the amount is collected and got into the hands of Chidambaram Chetty," the latter should hold it at the plaintiff's disposal and act according to the directions of Krishnan Chetty. It is alleged by the plaintiff that the amount was received from the Court at the instance of the said Krishnan Chetty by Siva Chithambaram's Pleader on the 3rd February, 1908, who paid it to Siva Chithambaram on the 10th. The suit was filed on the 6th February, 1911.

The Subordinate Judge held that Article 62 of the Limitation Act applied, and, therefore, the suit is barred.

That Article applies to all suits for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. In this case the money according to the allegations in the plaint was received in fact by the defendants' predecessor-in-title for the use of the plaintiffs' predecessor-in-title. The case of *Subbanna Bhatta* v. *Kunhanna Banta* (1) is directly in point. It is, however, argued before us that this Article applies to suits for 'money had and received' and where money is payable under a contract, the suit must be brought for breach of contract; that Art. 115 of the Limitation Act, and not Art. 62, applies and the decision cited above should not be followed. We are of opinion that the case before us is not one of contract. The fact that the defendant promised to pay the money to the plaintiff or hold it at his disposal does not by itself show there was a contract. No consideration is alleged; Art. 115, therefore, does not apply. That the defendant did not receive the money improperly or wrongfully is, according to the plaint, true but we are not prepared to hold that for that reason Art. 62 ceases to be applicable. No authority is cited in support of that argument. It was also argued that the defendant is a trustee and, therefore, S. 10 of the Limitation Act applies. We are clearly of opinion that the facts set out in the plaint do not show that the defendant was entrusted with the money for any specific purpose or that there was any express trust. Nor is the suit one against an agent. If there was an agency, it was simply one to receive the money and the agency ceased with the collection. It was then argued that Art. 132 applies. But the suit is not based on the mortgage instrument. The mortgage has been redeemed. For these reasons we follow *Subbanna Bhatta* v. *Kunhanna Banta* (1) and hold Art. 62 applies. It was also urged that the receipt of money by the defendant's Pleader is not receipt by the defendant under the terms of Art. 62. We think this contention is clearly unsustainable.

The appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) (1907) 30 Mad. 298.

A. I. R. 1916 Madras 525

OLDFIELD AND TYABJI, JJ.

Vinjamuri Veera Venkayya—Plaintiff—Petitioner.

v.

Yenamurthi Veerabhadrudu and *others*—Defendants—Respondents.

Civil Rev. Pet. No. 692 of 1913, decided on 9th October, 1914, against the order of Sub-Judge, Coconada, in Sm. C. Suit No. 938 of 1911.

[Madras Estates Land Act (1 of 1908), S. 3 (5)—Lessee, from transferee of zemindar, having right to lease or cultivate himself is estate-holder within S. 3 (5).

A person obtaining a lease of land with the right of leasing it to others as well as of cultivating it himself from a person who derives his right by transfer from the *zemindar*, is an estate-holder within the meaning of S. 3(5) of the Estates Land Act. **17** I. C. **120**, foll.

[P. 526, C. 1.]

P. Narayanamurthi—for Petitioner.

B. Narasimha Rao—for Respondents.

Judgment.—We follow *Sivini Appalanarasimhulu* v. *Murada Sanyasi* (1), and attach importance to the provision in paragraph 7 of Exhibit I for plaintiff's leasing the land to others as well as cultivating it himself. There is also the fact that the plaintiff's predecessor derived his right by transfer from the original owner, the *zemindar* on these considerations. We agree with the lower Court that the plaintiff is a landholder within the meaning of S. 3 (5) of the Madras Estates Land Act and dismiss the civil revision petition with costs.

S.N./R.K.

Petition dismissed.

(1) (1912) 17 I. C. 120.

A. I. R. 1916 Madras 526

SADASIVA AIYAR AND NAPIER, JJ.

Janga Venkatareddy and *others*—Defendants—Appellants.

v.

Jamal Ahmed Saheb—Plaintiff—Respondent.

Second Appeal No. 986 of 1914, decided on 12th April, 1915, from the decree of Tempy., Sub. Judge, Masulipatam, in Appeal Suit No. 130 of 1913.

(a) Transfer of Property Act (4 of 1882). S. 55 (a)—Scope of covenant for title explained—Deficiency in extent of land purchased is not breach of covenant for title—It is failure of consideration.

A covenant for title is only a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that the seller has power to transfer the same. 18 All. 322; 29 Cal. 370; 11 I. C. 337, ref. to. [P. 526, C. 2.]

A suit to recover compensation for deficiency in the extent of land purchased is not a suit for damages for breach of a covenant for title, but one for part failure of consideration and for compensation for failure to perform the vendor's part of the contract in full. [P. 526, C. 2.]

(b) Specific Relief Act (1 of 1877), S. 14—Where part unperformed bears small proportion, suit for specific performance and compensation would lie—The rule applies to where deficiency in extent of land purchased is discovered after sale.

Where under the contract the part unperformed bears only a small proportion to the whole of its value, a suit for specific performance with a claim for compensation would lie for the unperformed part. [P. 526, C. 2 & P. 527, C. 1.]

The same rule also holds good even where the mistake as to the extent is discovered after the execution of the conveyance, as the vendee before that date has no right to inspect the land except with the vendor's permission.]P. 527, C. 1.]

Hill v. *Buckley*, 17 Ves. 394; *In re Turner and Skelton*, (1880) 13 Ch. D. 130; *Cann* v. *Cann*, 3 Sim. 447, foll. *Jolliffe* v. *Baker*, (1883) 11 Q. B. D, 255; dis. from.

R. Narasimham—for Appellants.

T. Ramachandra Row—for Respondent.

Napier, J.—This is an appeal from a judgment of the Temporary Subordinate Judge of Masulipatam, allowing a claim for compensation by the purchaser of certain land in respect of a deficiency in extent. The District Munsif disallowed the claim on the authority of the case reported as *Abdullah Khan* v. *Abdur Rahman Beg* (1). The Subordinate Judge, relying on the case reported as *Doyal Krishna Naskar* v. *Amrita Lal Das* (2), where *Abdullah Khan* v. *Abdur Rahman Beg* (1), was dissented from, allowed the claim. The basis on which the claim is made is not stated in the plaint, but it was sought in argument to base it on the implied covenant for title relying on the case reported as *Tawala Nageswara Row* v. *Saripalli Sambasiva Row* (3). In my opinion that case does not apply. A covenant for title, is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed, but, as shortly defined in S. 55 of the Transfer of Property Act, a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. Further, this suit is well known in English Law and has never been based on a covenant for title. In my opinion the suit is brought for part failure of consideration owing to a mutual mistake. Admittedly where a contract has been made and one of the parties is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole of its value, a suit lies at the

(1) (1896) 18 All. 322.
(2) (1902) 29 al 370.
(3) (1911) 11 I C 337.

instance of the other party under S. 14 of the Specific Relief Act, (I of 1877) for direction by the Court for specific performance of so much of the contract as can be performed with compensation in money for the deficiency. If, therefore, the parties had discovered their mistakes as to the area prior to the conveyance, the vendee could have brought a suit asking for compensation; and seeing that the Specific Relief Act is intended to give reliefs of a certain class where an injury has been suffered, it seems necessarily to follow that a legal injury is presumed by this Act to exist, for which the Act provides a remedy at one stage. I am, therefore, clear that there is a cause of action arising out of a legal injury. This is the view taken by the Courts of Equity in England: *vide* the leading case of *Hill* v. *Buckley* (4) and Dart's Law of Vendors and Purchasers, 7th Edition, page 675.

The only question that remains is whether this claim cannot be made after the execution of the conveyance That point is expressly decided by Jessel, M.R., in *In re Turner and Skelton* (5). The learned Master of the Rolls says as follows: "No book can be produced to show that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? .....The purchaser can only investigate the state of the property before completion by permission of the vendor, which permission the vendor is not bound to give. When the mistake is one which a purchaser could not by due diligence discover, why should he be held not to be entitled to compensation?" The learned Master of the Rolls followed an earlier decision, *Cann* v. *Cann* (6), and decided in favour of the vendee It is true that a different view was taken in *Jolliffe* v. *Baker* (7), but I am prepared to follow the decision of this high authority as I find nothing in any Statute which makes the principle inapplicable.

The appeal will, therefore, be dismissed with costs.

Sadasiva Aiyar, J.—I entirely agree and have nothing to add.

Appeal dismissed.

(4) 17 Ves. 394.
(5) (1880) 13 Ch. D. 130.
(6) 3 Sim. 447.
(7) (1883) 11 Q. B. D. 255.

A. I. R. 1916 Madras 527

AYLING AND PHILLIPS, JJ.

N. C. Whitton—Petitioner.

v.

Mammad Maistry—Respondent.

Criminal Revn. Case No. 454 of 1915, and Criminal Revn. Petn. No. 367 of 1915, decided on 26th October, 1915, from the order of 2nd Class Magte., Vayitri.

(a) Madras Planters Labour Act (1 of 1903), Ss. 24 and 35—Number of directions and prosecutions in default is not restricted.

There is no limit to the number of repeated directions which may be issued under S. 35 or to the number of prosecutions and convictions which may follow in default. [P. 528, C. 1 & P. 530, C. 1.]

(b) Madras Planters Labour Act (1 of 1903), S. 35 Action under S. 35 does not terminate contract and does not bar fresh prosecution.

Action taken under S. 35 does not put an end to the contract and is, therefore, no bar to a second trial and conviction for disobedience to a direction to fulfil it. 36 Mad. 497; diss. from *Unwin* v. *Clarke*, 19 Q. B. 417; and *Cutler* v. *Turner*, 9 Q. B. 502, foll. [P. 530, C. 1.]

(c) Madras Planters Labour Act (1 of 1903), S. 24—'Fails to account for money advanced' construed.

Per *Ayling, J.*—The words "fails to account for the money advanced to him" mean simply this: failure to either supply labour equivalent to the advance received or to refund any balance of the advance for which he is unable to supply labour or to prove that it has been legitimately expended. [P. 528, C. 2.]

Barton for Petitioner.

Facts.—One Mr. Whitton, a planter in Malabar, complained to a Magistrate that Mammad Maistry had committed breach of a contract entered into by him in December 1912 in respect of work in the complainant's Company, known as, the Meppad Wynaad Tea Company, and prayed that the accused might be directed to complete the performance of his contract under S. 35 of the Act. In 1913, one direction was given to the accused, but he did not comply with it and was convicted and sentenced to one month's rigorous imprisonment under S. 24 of the Act. The complainant again applied to another Magistrate for another direction after the return of the accused from Jail, and he was again prosecuted, convicted and sentenced to two months' imprisonment. The complainant again applied to the same Magistrate for giving the accused a further direction. The

Magistrate refused it on the ground that he had no jurisdiction to make successive directions. The present revision petition is against that order.

ORDER.

Ayling, J.—We are asked to revise an order of the 2nd Class Magistrate of Vayitri, dated 17th March, 1915, refusing to direct counter-petitioner under S. 35 of the Madras Planters Labour Act (1 of 1903) to complete the performance of the contract entered into by him with petitioner. The Magistrate's ground of refusal is that he had already issued one such direction on 18th November, 1913, in default of compliance with which counter-petitioner had been convicted and sentenced to two months' rigorous imprisonment under S. 24 (*c*) of the same Act. He had in addition been previously tried and convicted under the same section and clause on 28th March, 1913 for failure in connection with the same contract. The Magistrate held, following *Ponga Maistry* v. *Emperor* (1), that he had no power to make more than one direction: and on this view dismissed petitioner's application.

Mr. Barton, who appears for petitioner, contends that the ruling above quoted is erroneous; and that apart from such special restrictions as may be involved in the particular contract, there is no limit to the number of successive directions which may be issued under S. 35 or to the number of prosecutions and convictions which may follow in default.

He has been at pains to explain that his client is prosecuting this petition simply as a test case and is only anxious to have the law on the matter determined. The counter-petitioner is not represented: but the learned Public Prosecutor has been instructed to oppose the petition and support the Magistrate's order. He has done so not with reference to the abstract question of law on which the order is based: but by arguing that the two previous convictions of counter-petitioner and the previous direction have all been illegal and that for this reason, the direction now applied for should not be granted. We do not think we should be justified in ignoring such points when asked to interfere in revision to counter-petitioner's detriment.

We have, therefore, to consider the facts of the present case as well as the bearing of the Act upon them.

The contract itself is Exhibit A. Disregarding superfluous detail it may be said to provide as follows:—

Counter-petitioner (called the contractor in consideration of an advance of Rs. 50 undertakes to work, with 25 coolies, whom he is to procure on petitioner's estate for six months from 20th December, 1912 to 19th June, 1913 at fixed rates of wages; if he makes default in such work, in whole or in part, petitioner has the option of calling on him to complete the performance of the work in default at any time up to 20th December, 1915.

His subsequent conduct is not in dispute.

He failed to appear till 13th February, 1913, when he brought not 25 coolies but 8; these worked till 28th February, 1913, when they began to absent themselves and were all gone by 16th March, 1913. After that, no more work was done. Counter-petitioner returned to the estate after his first imprisonment and the first direction; and promised to pay the balance due by him. He has not, however, done so.

On these facts, I can find nothing illegal in the first conviction which is dated 28th March, 1913. We have heard some discussion of the meaning of clause (*c*) of S. 24: but I take it that the words "fails to account for the money advanced to him" mean simply this: failure to either supply labour equivalent to the advance received or to refund any balance of the advance for which he is unable to supply labour or to prove that it has been legitimately expended.

On this reading, the conviction was justified and also the direction which was passed on 18th November, 1913 under S. 35 on counter-petitioner's apprehension after release from the first term of imprisonment.

Admittedly this direction was not complied with. Counter-petitioner promised to return the balance of money due, but failed to do so, or to do any more work.

(1) (1913) 36 Mad. 497=18 I. C. 415.

Now, what was the effect of this? The Act nowhere makes non-performance of a contract punishable in itself. S. 24 renders punishable three specified failures in connection with a contract. It says:

"Any maistry who

(*a*) fails without sufficient cause to present himself at an estate upon the date specified in his contract; or

(*b*) having contracted to remain upon an estate for a specific time, fails without sufficient cause so to remain; or

(*c*) fails to account for the money advanced to him by a planter in consideration of his contracting to supply labourers to work on an estate;

shall be punishable with imprisonment which may extend to three months or with fine which may amount to five hundred rupees or with both; and the Magistrate may award to the planter out of the fine such compensation as he may deem fit."

S. 35 runs thus:

"On the expiry of any sentence of imprisonment on a maistry or labourer for an offence under this Act, the maistry or labourer shall, if the planter or employer so requests, be produced before the Magistrate, who shall direct such maistry or labourer to complete the performance of his contract on pain of further prosecution and punishment in case of his refusal to do so, and no conviction under this Act or imprisonment under such conviction shall have the effect of releasing any maistry or labourer from the terms of his contract or labour contract, as the case may be."

"Provided that no such direction shall be given, in the case of a labourer, if more than 12 months have elapsed since the date on which his original labour contract would have determined."

We cannot take this as constituting disobedience of the contract, a distinct offence, if only for the simple reason that no punishment is specified for it. Mr. Barton admits that the words "on pain of further prosecution" can only be taken to refer to a fresh prosecution under S. 24.

This is the view taken by the Magistrate, who in Calendar Case No. 580 of 1914 has convicted counter-petitioner of the same offence under S. 24 (*c*), failure to account for the advance. The question is whether this was legal—or whether counter-petitioner was entitled to plead "*autrefois acquit*."

That the contract was still in force cannot, I think, be disputed. As already pointed out, petitioner had the option of extending the period for performance up to 20th December, 1915: and S. 35 itself provides that the previous conviction should not operate as release.

Mr. Barton, in supporting the legality of the second conviction, relies on two English cases, *Unwin* v. *Clarke* (2) and *Cutler* v. *Turner* (3).

Both these cases are of workmen absenting themselves from work contrary to the terms of the contract, and it is held that in such circumstances although the workman did not return to work after his first conviction and imprisonment, yet as the contract continued he was guilty of a fresh offence, and could be again convicted. The question is whether the principle of these rulings applies to a case of failure to account for an advance. After careful consideration, I am inclined to think it does. The contract and with it, the liability to account for the advance is still in force: and counter-petitioner is by the option of the employer given a fresh chance of accounting for it, in either of the ways in which he could have accounted for it originally. His failure to do so is just as much a fresh offence as the workman's failure to resume work in the English cases. I can find no valid ground of distinction.

No argument has been addressed to us to the contrary.

The conviction in Calendar Case No. 580 of 1914 was therefore, correct: and there only remains the question of whether the Magistrate was justified in refusing the second direction. The wording of the section appears to leave him no option; and I can see nothing in the Act which is opposed to the issue of repeated directions. I have carefully considered the judgment in *Ponga Maistry* v. *Emperor* (1). I am not without some sympathy for the view which the learned Judge seems to have taken: but we have to construe the Statute as it stands, and with all respect, I am unable to agree that the Magistrate

(2) 19 Q. B. 417=14 L. T. 356.
(3) (1874) 9 Q. B. 502=43 L. J. M. C. 124.

can issue only one direction. It seems to me unfortunate that the Magistrate is given no discretion regarding the issue of directions and in this, as in other respects, the Act seems to call for amendment. The Magistrate has, of course, discretion as to the imposition of punishment on conviction: and would presumably exercise it where the Act was being vindictively used. But this is only a partial safeguard against the possibility of oppressive use of the section. As the law stands, in the present case, the Magistrate should have issued the direction, and I would now direct under S. 423, Code of Criminal Procedure, that a direction should issue.

Phillips, J.—I need only add that I agree in the view taken by my learned brother of the meaning of S. 35 of the Act. The section itself does not limit the number of directions to fulfil the contract that can be made, but it does say that action taken under the section does not put an end to the contract. If the contract is still in force, there can undoubtedly be a fresh breach of such contract and for each breach (coming within the provisions of S. 24) the offender renders himself liable under S. 35. This view is in accordance with the interpretation put upon similar Statutes in England *Unwin* v. *Clarke* (2) and *Cutler* v. *Turner* (3).

I, therefore, concur in the order proposed.

S.N./R.K.

Petition allowed; *Application granted.*

A. I. R. 1916 Madras 530

SADASIVA AIYAR AND NAPIER, JJ.

Namburi Venkatarama Chetty and *others*—Petitioners—Appellants.

v.

Vemur Thiruvengadathan Chetty and *others* — Counter-Petitioners — Respondents.

Original Side Appeal No. 62 of 1912, decided on 30th November, 1914, from the Judgment of Bakewell, J., dated 6th August, 1912.

Civil P. C. (5 of 1908), S 92—Scheme—Application to change scheme must be accompanied by fresh scheme—Mere mismanagement through misconduct, old scheme should not be changed.

An application to alter a scheme of management under which the affairs of a temple are administered even if based on grounds of malversation, should, unless accompanied by a fresh scheme to prevent such malversation, be dismissed. The mere fact that some mismanagement has resulted through the misconduct of the Committee members and the trustees, is not a ground to modify a scheme which contains provisions which if properly worked are sufficient to protect the interests of the trusts.

[P. 530, C. 2 & P. 531, C. 2.]

T. R. Ramachandra Aiyar, *T. R. Krishnaswamy Aiyar* and *K. B. Ranganatha Aiyar*—for Appellants.

A. Suryanarayana Aiyar, *M. A. Tirunarayanachari* and *Short* and *Bewes & Co*—for Respondents.

Sadasiva Aiyar, J.—This is an appeal from an order of Bakewell, J., on the original side refusing to give leave to the applicants to bring forward a new scheme in place of the scheme which was settled in Suit No. 222 of 1895 on the 10th November, 1896. The application made by the petitioners was not accompanied by any kind of draft scheme which the petitioners wanted to be substituted for the present scheme. The affidavit which was put in along with the application does not, except in a few places, deal with any defects in the scheme, but merely contains allegations as to how the charities have been mismanaged in the opinion of the applicants by the committee members and by the *Dharmakartas*.

In paragraph 11 of the affidavit it is alleged that the scheme requires modification because the Colla family, out of the male members belonging to which the *Dharmakarta* has to be chosen, is not a family out of which it is desirable in future to so select *Dharmakartas*. It is further alleged that it is necessary that the powers of the *Dharmakarta* to be chosen from that family, if that family is to be retained as the family out of which the *Dharmakarta* is to be chosen, should be curtailed. It is also alleged that the scheme does not make it clear by whom such *Dharmakarta* is to be chosen.—The allegations in paragraph 11 of the affidavit proceed upon a mistaken footing that the question as to who was to be *Dharmakarta*, from what family the *Dharmakarta* was to be chosen and how he was to be chosen, was intended to be part of the scheme settled in the former suit. It is part of the decree itself that the *Dharma-*

karta should be chosen from the Colla family and the scheme was not intended to contain any provisions as to how the person was to be chosen from out of the male members of the Colla family. As regards the curtailing of the powers of the *Dharmakarta*, the scheme only provides that he should be in possession of the funds which are allocated by the committee in respect of the specific expenditures to be incurred in connection with the trusts. That a hereditary *Dharmakarta* should be deprived even of this power is no doubt a strong step to take, but if a Court is satisfied that it is necessary in the interests of the institution to deprive him even of this power and that it is necessary to appoint a treasurer who should, in supersession of the *Dharmakarta*, handle the moneys allocated for the expenses, paying out those sums which the trustee asks him to pay out, it may be necessary to modify the scheme in that respect. But we are not satisfied from the affidavits filed on both sides that any such necessity has been shown to curtail the powers of the *Dharmakarta* and to modify the scheme in that respect.

The only other paragraphs of the affidavit which really relate to the scheme are paragraphs 12 and 13. In these paragraphs it is contended that owing to the scheme providing that the two committee members who retire at the end of every three years are eligible for re-election, the out-going members have been, as a rule, re-elected by the remaining members of the committee and that this gives room for lack of efficient supervision by the committee over the affairs of the trust.

The counter-affidavit filed on behalf of the committee mentions some of the reasons why for some years after the scheme came into force, it was considered advisable to have the out-going members re-elected without trying to bring in "fresh blood" and it also indicates that in recent years the scheme has not prevented desirable changes occurring in the constitution of the *personnel* of the committee members.

We are satisfied that the view taken by the learned judge of the Court below is correct, namely, that the application by the present petitioners is not based really on the grounds that the scheme itself is defective, but that it is made for the purpose of making radical alterations in the original scheme so as to give the body of worshippers more opportunities to interfere in the management and control of the trusts and so to upset the very basis of the scheme as settled in 1896. Under these circumstances we think that the learned Judge used his discretion properly in not granting to the applicants, (who had no definite alternative scheme to put forward), leave to apply to alter the present scheme in an indefinite manner. The mere fact, even if it be true, that some mismanagement has resulted through the alleged misconduct of the committee members and the trustees, is not a ground for obtaining leave to modify a scheme which contains provisions which, if properly worked, are sufficient to protect the interests of the trusts. The fact referred to would only furnish grounds, as pointed out by the learned Judge, to have the members of the committee and the trustees removed from their offices in a suit properly framed and brought.

In the result we dismiss the appeal, with two sets of costs.

Napier, J.—I concur.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 531

SANKARAN NAIR AND HANNAY, JJ.

In re *Ali Mahomed Mukri* and *another* —Accused—Petitioners.

Criminal Revn. No. 604 of 1914, and Criminal Rev. Petn. No. 510 of 1914, decided on 9th December, 1914, from the Judgment of Sub-Divl., Magte., Puttur, in Criminal Appl. No. 34 of 1914.

Madras Forest Act (5 of 1882), S. 16—Land notified to be included but not so included in reserve forest—Owner paying assessment and in possession is not guilty under S. 16.

Where, under a notification published under S. 16 of the Madras Forest Act, 5 of 1882, certain land alleged to belong to the accused had been included in the tract proposed to be constituted a reserve forest but the same was excluded from the reserve at the time the latter was demarcated, and where the party alleging title continued in possession and enjoyment, a *patta* being issued to him and assessment received from him therefor, he cannot be convicted for trespass under the Forest Act.

[P. 532, C. 1.]

K. Sundara Rao—for Accused.

Public Prosecutor—for the Crown.

Facts. One Moideen Beari possessed some lands in the village of Kalingi, near which the Government wanted to reserve a forest, and a Gazette notification was accordingly published under S. 6 of the Madras Forest Act of 1882. In this notification a portion of lands which Moideen Beari claimed to be his own were included. The latter preferred an appeal out of time and it was dismissed. A final notification was thereafter published under S. 16 of the Madras Forest Act. But in demarcating the actual boundary of the reserve Moideen Beari's lands were excluded and the Revenue Authorities granted a *patta* and collected assessment from Moideen Beari for his lands, which continued to remain in his possession. Moideen Beari sold the lands to the accused in 1913 and when they tried to improve the land, they were prosecuted for the offence of trespass and of clearing the reserve and were convicted. Against this conviction they preferred this criminal revision petition to the High Court.

Order.—Moideen Beari held the *patta*. He sold the land to the petitioners. Moideen Beari and after him the petitioners paid the assessment and remained in possession. There was a notification under S. 16 of the Forest Act, 1882, reserving it as forest land, but boundary stones were afterwards fixed excluding the land in contravention of the notification. In these circumstances we are of opinion that the petitioners are not guilty of trespass. We set aside the conviction under the Forest Act, 1882, and direct the fine, if levied, to be refunded.

S. N./R.K.

Conviction set aside.

A. I. R. 1916 Madras 532

WALLIS, C. J. AND HANNAY, J.

Pilladi Venkanna—Plaintiff—Appellant.

v.

Pilladi Gangamma—Defendant—Respondent.

First Appeal No. 115 of 1913, decided on 8th February, 1915, against the decree of Dist., Judge, Kistna, in Original Suit No. 64 of 1911.

Hindu Law—Partition—Evidence Oral—Partition against interest of one—Presumption is against partition—Burden of proof is on party alleging partition.

Where the evidence relied on to prove a partition is merely oral and not documentary and where it is against the interests of one of the parties to the partition to effect it, the presumption is that no such partition took place. The burden of proof in such circumstances is on the party who asserts that the partition took place.

[P. 533, C. 1.]

N. S. Narasimhachariar for *V. Ramadoss*—for Appellant.

T. Rangachariar—for Respondent.

Judgment.—This is in effect a suit brought by the plaintiff, a minor, for a declaration that the suit property was the joint family property of himself and his undivided uncle, now deceased, and that the alleged will of the undivided uncle is void and inoperative. The District Judge on a very careful examination of the evidence has come to the conclusion that the alleged partition between the plaintiff and his uncle has been proved. There are, however, certain facts in the case which appear to us to be deserving of more weight than he has attached to them. In the first place, the alleged partition does not appear to be a very probable one. The family consisted of the husband of the defendant and the minor. It is not alleged that the minor's uncle, who was then the manager of the family, was wasting the property or that it was otherwise to the interest of the minor that a partition should take place. The uncle died in diabetes within two years from the date of the alleged partition and as he had no issue, it was decidedly against the interest of the minor that a partition should take place. It is said that the young mother of the minor may have wanted a partition for purposes of her own. It is unnecessary to consider the limits of a mother's authority to enter into a partition, as the question has not been argued before us, because we think that in circumstances such as those I have mentioned, the partition should be proved by very clear and satisfactory evidence and on the whole we are not satisfied that it has been so proved. There is no direct evidence in writing of the partition. It is admitted that both the uncle and the minor continued to live in the same house after the alleged division. Six months later an agreement, Exhibit D, was entered into with the minor's maternal uncle under which

the whole of the family property was leased to him for seven years on condition that he was to discharge certain debts of the family, that he was to pay grain worth of Rs. 40 a year to the uncle and to pay Rs. 244 for the marriage of the minor which he was to get celebrated himself. This direction is explained as due to the fact that the intention was that the minor was to marry the daughter of the lessee. In this agreement, Exhibit D, the property leased is referred to as "our one half share" and that seems to us to be very extraordinary language to use if there really had been a partition. The defendant relies upon the fact that Exhibit D is said to have been made between the lessee and the uncle and the minor by his guardian and mother, whereas in the case of certain previous documents, Exhibits B, C-1 and C-2, they are said to have been executed in favour of the uncle and "*his undivided son*," the minor, through his mother, guardian. Then reliance is placed upon a document, Exhibit I, which was drawn up by the plaintiff's 1st witness. According to his evidence that document was drawn up at the time when Exhibit D was executed. His explanation is that, as the lands were to be put in possession of the lessee for seven years the deceased wanted a memorandum of his share. We do not think that this is entitled to much weight as evidence of partition. That is all the documentary evidence in the case. There is a certain amount of oral evidence to prove the partition, and the plaintiff relies upon certain slight discrepancies in that evidence. We do not attach so much importance to that, as we do not think it is safe to act upon oral evidence of that kind in support of a partition such as is set up in this case, a partition which appears to us to be contrary to the interests of the minor and exceedingly unlikely to have taken place. We do not think that the defendant has satisfied the onus which was upon her to establish such a partition.

So far as the will is concerned, as there was no partition and as, therefore, the property bequeathed under the will is joint family property, the Will, even if genuine, is inoperative and the plaintiff is entitled to a declaration that it is not binding on the suit properties.

We, therefore, allow the appeal and decree the suit with costs throughout.

S.N./R.K.

Appeal allowed; *Suit decreed.*

A. I. R. 1916 Madras 533

AYLING, J.

A. K. Sundarsanam Aiyangar—Petitioner.

v.

Elayavalli Srinivasachari — Respondent.

Criminal Rev. Case No. 318 of 1914, and Criminal Rev. Pet. No. 273 of 1914, decided on 27th November, 1914, from the order of Head-quarter Joint-Magistrate, Tinnevelly, in his proceedings, dated 30th March, 1914.

Criminal P. C. (5 of 1898), S. 144 (4)—Order under S. 144 can be rescinded or altered by successor of Dist. Magistrate and need not be transferred to the acting Dist. Magistrate passing order.

An order passed under S. 144, Criminal Procedure Code, by a Joint Magistrate, while acting as a District Magistrate, can be rescinded or altered after his reversion, by the then District Magistrate himself and the latter cannot transfer an application for rescission or alteration to the former. [P. 533, C. 2.]

T. Richmond and *C. Narasimha Chariar*—for Petitioner.

E. R. Osborne—and *N. S. Rangaswami Aiyangar*—for Respondent.

Public Prosecutor—for the Government.

Order.—The order under S. 144, Criminal Procedure Code, was passed by Mr. Jackson as District Magistrate. A petition for its rescission under clause (4) of the same section was presented to his successor, after Mr. Jackson had handed over charge of the office of District Magistrate and reverted as Joint Magistrate. In such circumstances the power of rescinding or altering the order lay only with Mr. Jackson's successor and the latter was wrong in transferring the petition to Mr. Jackson, for disposal Mr. Osborne contends that the clause authorises a Magistrate to rescind or alter an order, after vacating office but I do not think this is the proper interpretation.

Mr. Jackson after receiving the petition by transfer passed an order dealing with the case on its merits, and declining to

modify or rescind his order as District Magistrate.

It is suggested that I should set aside the District Magistrate's order transferring the petition and that of the Joint Magistrate and direct the District Magistrate to restore the petition to his file and dispose of it himself. But in view of the discretionary nature of the matter and of the fact that the original order has long ago expired by lapse of time, no useful purpose would now be served by such a course.

I, therefore, decline to interfere.

S.N./R.K.

Petition dismissed.

A. I. R. 1916 Madras 534 (1)

HANNAY, J.

In re *Chinnaswamy*—Accused.

Criminal Rev. Case No. 522 of 1914, and Case referred No. 53 of 1914, decided on 24th September, 1914, made by the Dist. Magte., Chingleput, dated 19th June, 1914.

Criminal P. C. (5 of 1898), Ss. 118 and 120—Order that sentence of imprisonment to run concurrently with other sentence already undergoing is illegal.

S. 120 (1) read with S. 123 (1) of the Code of Criminal Procedure, makes it illegal for a Magistrate to pass a sentence of imprisonment to run concurrently with some other sentence the accused is already undergoing. [P. 534, C. 1.]

Public Prosecutor—for the Government.

Order.—The order of the Joint Magistrate in Miscellaneous Case No. 8 of 1914, that the period of one year's rigorous imprisonment imposed on the accused under S. 118 of the Criminal Procedure Code is to run concurrently with the sentence which the accused was at that time actually undergoing in another case, is illegal with reference to the terms of S. 120 (1) of the Criminal Procedure Code read with S. 123 (1). Under S. 120 (1) the period for which security is required can only commence on expiry of the sentence which the accused is already undergoing, and under S. 123 (1) the accused may be detained in prison after the expiry of the sentence he is now undergoing if he has not by that time furnished security as ordered. The order of the Joint Magistrate will be modified accordingly, so as to make the period for which security is required and the period of imprisonment awarded in the event of security not being furnished to commence from the expiration of the previous sentence.

S. N./R. K.

Order Modified.

A. I. R. 1916 Madras 534 (2)

TYABJI, J.

Annamalai Chetty and *another*—Plaintiffs— Petitioners.

v.

Poosari Suppia Thevan—Defendant—Respondent.

Civil Revn. Petn. No. 528 of 1914, decided on 15th September, 1915, from the decree and Judgment of Dist. Munsif, Melur, in Sm. C. Suit No. 23 of 1914.

Registration Act (16 of 1908), S. 49—Unregistered lease deed cannot even be looked at for determining fair rent for use and occupation.

A lease of immoveable property which is compulsorily registrable and not registered, cannot be looked at for the purpose of determining the fair amount of occupation rent payable in respect of the property which formed the subject of that demise. 35 Mad. 63, foll.; A. I. R. (1915) Cal. 39; 31 All. 276; dist. [P. 535, C. 1.]

K. Rajah Aiyar—for Petitioners.

N. S. Rangaswami Iyengar—for Respondent.

Judgment.—An application is made to me to allow time to have the plaint translated and printed. I refuse the application. On the merits, the first point taken before me is that the District Munsif ought not to have considered the Commissioner's report to be unsatisfactory. I think the District Munsif was entitled to prefer the defendant's evidence to the report of the Commissioner. I have, however, looked at the Commissioner's report, which is printed by Mr. Rajah Aiyar and the evidence given by the Commissioner in Court was read to me. The District Munsif was, in my opinion, justified in taking the view he did. It was next argued before me that the defendant ought to have been ordered to give some damages, because he was in use and occupation of the land. The answer to it is that the suit may be considered in two ways, (1) as based on a breach of the contract to cultivate the

land and (2) as for fair compensation for use and occupation of land.

As to the *first* aspect of the case, there is no contract that can be proved in the Court, the lease being unregistered.

With regard to the *second* head, it seems to me there are two answers :—

(*a*) that the defendant did not use or occupy the land ;

(*b*) that the land was of so little value that the defendant was not bound to pay anything in respect of its use and occupation, assuming that he did occupy it.

On the *last* point several cases were cited to me in support of the contention that an unregistered lease [though it falls under S 17 (*d*) of the Registration Act and it ought to have been registered) may be looked at for the purpose of determining what would be fair rent for the use and occupation of the land. In the case of *Amir Ali* v. *Aykup Ali Khan Saudagor* (1), however, the Court did not admit the lease in evidence, but admitted other oral evidence with reference to the rent. In the case of *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (2), the Court did apparently consider the *Kabuliyat* for the purpose, but the *kubuliyat* was registered though void as a lease. As the parties had acted upon the *kabuliyat* for some time, the payment of rent by the lessees would have been evidence showing what could be fair occupation rent. The real point decided in the case was that occupation rent could be demanded, and not as to what would be fair occupation rent. It seems to me on the other hand that the case in *Narayanan Chetty* v. *Muthiah Servai* (3) is strong authority against the admissibility of such a lease as is under consideration for the purpose of proving that the petitioners had agreed to a certain amount of rent for the property.

For these reasons, it seems to me that the suit was rightly dismissed and the petition is dismissed with costs.

S.N./R.K.

Petition dismissed.

(1) A. I. R. (1915) Cal. 39=25 I C. 509=41 Cal. 347.
(2) (1909) 31 All. 276=2 I.C. 211.
(3) (1912) 35 Mad. 63=8 I. C. 520.

A. I. R. 1916 Madras 535

AYLING AND TYABJI, JJ.

Peruma Gowndan—Defendant—Appellant.

v.

Rama Gowndan and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1572 of 1913, decided on 7th December, 1914, against the decree of Dist.. Judge, Coimbatore, in Appeal Suit No. 212 of 1912.

(a) Civil P. C. (5 of 1908)—S. 100, Plea of limitation can be raised in second appeal if plea rests on pleadings and not on facts.

A plea of limitation can be allowed to be raised in second appeal only if it is certain that its legitimacy can be determined on the pleadings and that it depends on no possible question of facts regarding which the party adversely affected might have adduced evidence. 21 I. C. 410; Foll. [P. 535, C. 2.]

(b) Civil P. C. (5 of 1908), O. 41, R. 27—No evidence to justify admission of document or no application to take evidence about its admissibility—Court is justified in not considering it.

A Court is justified in refusing to consider a document when there is neither evidence on the record to justify its admission nor is any application made to take fresh evidence as to its admissibility. [P. 536, C. 1.]

L. A. Govinda Raghava Aiyar—for Appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*—for Respondents.

Judgment.—The appellant's first contention is one of limitation. This plea was not taken in either of the lower Courts or even in the original second appeal petition ; but only in a memorandum of supplementary grounds of appeal. In such circumstances we should only allow it to be raised, if we are certain that its legitimacy can be determined on the pleadings, and that it depends on no possible question of fact regarding which the party adversely affected might have adduced evidence. The appellant relies on the recent Full Bench ruling in *Doraisami* v. *Nondisami Saluvan* (1) and contends that as it is clear from the plaint that the plaintiff's elder brother (3rd defendant) attained majority more than three years before the institution of the suit, S. 7 of the Indian Limitation Act will apply and the plaintiff's suit will be time barred. There is no allegation in the pleadings that the 3rd defendant was

(1) (1913) 21 I. C. 410.

the managing member of the family and as such in a position to give a discharge on behalf of the plaintiff; and the 1st respondent's Vakil does not admit so much. The appellant points out that in the Full Bench case the status of managing member appears to have been inferred from the relationship; but under the special circumstances of this case and in view of the danger of the plaintiff's being prejudiced by a technical plea raised at so late a stage we are not disposed to proceed on such an assumption here. Moreover the plaint specifically alleges that the 3rd defendant had been colluding with the 1st defendant and this is also a matter which might have to be taken into consideration in determining the applicability of S. 7 of the Indian Limitation Act. After careful consideration, we do not think we should be justified in allowing the plea of limitation and we, therefore, disallow it.

It is next argued that the finding of the District Judge on the 1st issue is vitiated by his refusal to consider Exhibit V. A reference to the evidence shows that the evidence on record was not sufficient to justify the admission of this document; on the other hand the 1st respondent does not seem to have objected to its admissibility in the District Munsif's Court. The objection was however, specifically put forward by the 1st respondent in his appeal petition to the District Court, and it does not appear that any application was made to the District Judge to take fresh evidence as to its admissibility. We cannot say that in these circumstances the District Judge's refusal to consider it was illegal [*vide* also *Kanto Prashad Hazari* v. *Jagat Chandra Dutta* (2) and S. 165 of the Indian Evidence Act]; and we refuse to interfere with his finding.

* * * *

S.N./R.K.

Appeal dismissed.

(2) (1896) 23 Cal. 335.

A. I. R. 1916 Madras 536

AYLING AND TYABJI, JJ.

Sankaravelu Pillai—Plaintiff—Appellant.

v.

Muthusami Pillai—Defendant—Respondent.

Second Appeal No. 1546 of 1914, decided on 21st September, 1915, from the decree of Tempy., Sub-Judge, Ramnad, in Appl. Suit No. 513 of 1913.

(a) Registration Act (16 of 1908), S. 17—S. 17 does not apply to proper judicial proceedings—Compromise embodied in decree need not be registered.

S. 17 does not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court. [P. 537, C. 1.]

Where, therefore, a compromise arrived at by the parties to a case is incorporated in the terms of the decree of the Court, such compromise can be adduced in evidence in a subsequent suit notwithstanding that it has not been registered. 20 All. 171, (P. C.) and 22 Mad. 508 (P. C.), Foll. [P. 537, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 8—Hindu widow getting one-fourth by compromise in claim as absolute owner—¼ far in excess of proper maintenance—Grant held not of limited interest—Presumption of limited grant did not apply.

Where, a claim by a Hindu widow to a certain property as absolute owner was compromised by giving to the claimant one-fourth of the property in dispute and it was admitted that this one-fourth was far in excess of what she would have been entitled to get if it were intended merely to take the place of her maintenance:

Held, that the presumption of Hindn Law that in a transfer by a Hindu male to a Hindu female only a limited estate is granted, did not apply and that the transfer was an absolute transfer governed by S. 8. [P. 538, C. 1 & 2.]

K. V. Krishnaswami Aiyar—for Appellant.

T. M. Krishnaswami Aiyar—for Respondent.

Tyabji, J.—Two main questions arise for decision in this appeal, in which the rights of the parties under Exhibit II have to be determined.

The *first* question is whether Exhibit II required registration, or whether it can be adduced in evidence and can affect immoveable property notwithstanding that it has not been registered. This question depends primarily upon the effect of Ss. 17 and 49 of the Indian Registration Act. S. 17 provides in the first instance that the documents mentioned thereinafter shall be registered if the property to which they relate is situate in certain districts. Then certain classes of documents are mentioned which are all such as operate to create, declare, assign, limit or extinguish any right, title or interest in immoveable property; and include gifts and leases.

Then the second sub-section of S. 17 excepts twelve kinds of documents which need not be registered, though it might otherwise have been considered that clauses (*b*) and (*c*) of sub-S. (1) covered them, in other words, that they were documents of the classes mentioned above. Amongst the excepted class of documents is mentioned, "any decree or order of a court or any award."

S. 49 provides *inter alia* that no document required by S. 17 to be registered shall affect any immoveable property comprised therein unless it has been registered.

The first argument of the appellant is that Exhibit II is a non-testamentary instrument purporting to create an interest in real property and ought, therefore, to be registered under S. 17, unless it is a decree or order of the Court, and that it is not a decree or order.

On this question there are two short *dicta* of the Privy Council to which it is necessary to refer. The first of them occurs in *Bindesri Naick* v. *Ganga Saran Sahu* (1). Their Lordships there state that "they are satisfied that the provisions of S. 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court." Then in *Pranal Anni* v. *Lakshmi Anni* (2) they state: "the *razinamah* was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The *razinamah*, in so far as it was submitted to and was acted upon judicially by the learned Judge, was itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it.

It seems to me that when these two passages in their Lordships' judgments are read together,—and it is significant that Lord Watson delivered the opinion of the Privy Council in each case—the principle upon which their Lordships proceeded appears to be that, inasmuch as under the law as regards registration read together with the law relating to *res judicata*, orders and decrees of the Court do not require to be registered, all such other judicial proceedings also as are necessary to be referred to in order to determine what it is that has become *res judicata*—all such other judicial proceedings also are excepted from the provisions of the Indian Registration Act: unless this were the case, the law relating to *res judicata* would be subject to the proceedings of the Court being registered, which, it is clear, could not have been the intention of the Legislature.

There are two decisions of this Court bearing upon the point under consideration, apparently conflicting with each other, *Natesan Chetty* v. *Vengu Nachiar* (3) and *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (4). It seems to me that it is unnecessary for us in the present case to determine the question on which the conflict of opinion arises. For taking the view of the Privy Council to be as I understand it, in the present case, it seems to me that the composition between the parties must be taken to have been incorporated in the decree of the Court, Exhibit V, which refers in terms to the compromise, Exhibit II, and purports to sanction it on behalf of the minor. It is true that the ultimate, operative part of the decree purports to be merely that the suit shall be dismissed, yet read as a whole, it seems to me to be clear that the decree incorporates the terms of the compromise.

I feel, therefore, no hesitation in arriving at the conclusion that the lower Appellate Court was right in the conclusion at which it arrived, that Exhibit II can be adduced in evidence and can be read as part of the decree, Exhibit V, so as to affect the immoveable property comprised therein notwithstanding that it has not been registered.

I come to the *second* point which was argued before us, namely, that on the true construction of Exhibit II the 1st defendant therein referred to, acquired only a limited or a widow's estate in the property mentioned. We had recently to

(1) (1898) 20 All. 171=25 I. A. 9 (P. C).
(2) (1899) 22 Mad. 508=26 I. A. 101 (P.C.).
(3) (1910) 33 Mad. 102=3 I. C 701.
(4) (1913) 36 Mad. 46=12 I. C. 317.

consider in Second Appeal No. 2859 of 1913 the effect of the decisions of the Privy Council and of the Courts of India which lay down that the ordinary intention of a Hindu in making a transfer of property to a Hindu woman ought to be taken into consideration when the deed of transfer is to be construed, and that the presumption, in the absence of something clear to show the contrary, is that only a limited estate is granted; the presumption may be rebutted by words showing that unrestricted power to alienate was given or that the estate was to be heritable by the heirs of the woman, and not to revert to the heirs of the grantor of the interest. I pointed out in that appeal that this rule must be taken to be an exception to the general law laid down in S. 8 of the Transfer of Property Act and S. 82 of the Indian Succession Act, and though I was myself inclined in that case to take the view that the full rights were given to the donee under the instrument, I felt pressed by the fact that both the lower Courts had decided to the contrary effect and that my learned brother agreed with the view taken by them. In the result I thought that it was not a case in which it was incumbent upon me to give effect to my own inclinations. I, therefore, agreed to the dismissal of that appeal.

In the present case, the circumstances seem to be materially different. We have the fact, *first* of all, that Exhibit II was a compromise in the course of a litigation brought about, as is clear from the facts mentioned to us, by the widow for the express purpose of asserting an absolute right to the property which was the subject-matter of Original Suit No. 429 of 1904; *secondly*, the plaintiff, it is stated in Exhibit II, has no right, interest or claim whatever in the property allotted to the widow; on the other hand, there is no doubt a reference to the fact that the absolute rights given under Exhibit II to the widow are "towards her food and clothing charges." *Thirdly*, the property that is given to the widow is only a fourth of what she claimed, and it is a part of the appellant's case that this one-fourth would be far in excess of what she would have been entitled to get if it were intended merely to take the place of her maintenance. On these facts, it seems to me that it is S. 8 of the Transfer of Property Act rather than the presumption of what a Hindu would ordinarily do when he purports to transfer, of his own free will property to a Hindu woman, that should govern the construction of this document. It seems to me that there is nothing to show that the dominant factor was the desire or the intention of the transfer or to give only such an interest in the property as he would of his own free will like to give. The parties were at arm's length. A claim was put forward to the absolute title to the whole of the property and that claim was compromised by giving to the claimant one-fourth of the property. It seems to me, therefore, that there is no room for the presumption being drawn that that one-fourth of the property must have been given on the terms on which it would have been given had it been a free gift. It seems to me that as a consequence, Exhibit II must be given effect to as an absolute transfer of the property, in accordance with the decision under appeal.

I would, therefore, dismiss the appeal with costs.

Ayling, J.—I entirely concur with my learned brother in holding that the *razinamah*, Exhibit II, does not require registration to render it admissible in evidence or operative as a transfer of the suit property to Minakshi.

As regards its correct interpretation, I am not free from doubt; but as my learned brother is clearly of opinion that the construction adopted by the lower Appellate Court is correct, I am not prepared to differ from him on this point.

The second appeal is dismissed with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 538

AYLING AND SADASIVA AIYAR, JJ.

Venkatachela Pillai and *others*—Defendants—Appellants.

v.

Ranga Pillai and *others*—Plaintiffs—Respondents.

Second Appeal No. 13 of 1914 decided on 11th December, 1914, against the

decree of Dist. Judge, Chingleput, in A. S. No. 7 of 1911.

(a) Civil P. C. (5 of 1908), O. 41, R. 27 Additional evidence can be taken in interest of justice—What is substantial cause within R. 27 stated.

An Appellate Court is entitled to receive additional evidence if it thinks necessary to do so in the interest of justice. [P. 539, C. 1 & 2.]

The disability to produce documents in the first Court for causes not due to fault or negligence of the party is "substantial cause" within the meaning of O. 41, R. 27 (*b*), of the Code of Civil Procedure, for admission of such evidence. [P. 539, C. 2.]

(b) Civil P. C. (5 of 1908), O. 41, R. 33—Lower Court's decree can be modified even if some parties are *ex parte*.

A High Court is entitled to correct errors in the decree of a lower Court even if some of the parties are not present before it in appeal. 31 Bom. 381 (P.C.); 31 Mad. 114; 36 Mad. 477; A. I. R. (1915) Mad. 762; 14 O. C. 327; 27 All. 634 (P.C.) Foll. [P. 540, C. 1.]

T. V. Venkatarama Aiyar—for Appellants.

T. R. Venkatarama Sastri and *A. S. Viswanadha Aiyar*—for Respondents.

Judgment.—The learned District Judge has found mainly on the strength of a document, Exhibit M, which was received in evidence by him on appeal that the plaintiffs (respondents) have proved that they were the nearest reversionary heirs of the deceased, Devaraja Pillai. It is contended by Mr. T. V. Venkatrama Aiyer for the appellants (who are most of the alienee-defendants) that that document was wrongly admitted in evidence and reliance is placed on *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) and *Krishnama Chariar* v. *Narasimha Chariar* (2).

The decision of their Lordships of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) was considered in several later cases in this Court. It is necessary, however, to refer only to *Andiappa Pillai* v. *Muthukumara Thevan* (3), Second Appeal No. 819 of 1911 and *Subba Naidu* v. *Ethirajammal* (4) and *Peddibotla Kameswaramma* v. *Bezwada Chelapathi* (5). In all these cases, it was held that when the Appellate Court wishes to admit fresh evidence in order to enable it to pronounce a judgment to the satisfaction of its own mind, there is nothing in *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) to prevent its doing so. It has been further observed in some of these later cases that the expression "for any other substantial cause" in O. 41, R. 27, (old S. 568) gave further power to the Appellate Court to admit fresh evidence on the same grounds as would justify the Court of first instance in granting a review. That the discovery, after the filing of the appeal of fresh evidence not known to and not available to the appellant after due diligence in the first Court is such substantial cause and that such evidence could be admitted at the hearing of the appeal has been also decided in *Kalka Singh* v. *Bharat Singh* (6) and that view is supported by the decision of their Lordships of the Privy Council in *Sheo Singh* v. *Raghubans Kunwar* (7), their Lordships having approved in that case of the reception of such fresh evidence by the Appellate Court notwithstanding the arguments addressed to them that the reception of such evidence was improper.

In the present case reading the judgment of the learned District Judge as a whole, we are satisfied that Exhibit M was admitted by him during the hearing of the appeal for "substantial cause" because he was satisfied that the plaintiffs were unable to produce it in the Court of first instance through no fault or negligence of their own. The learned District Judge, no doubt, does not refer expressly to the plaintiff's negligence not having been the cause of their ignorance of the existence of Exhibit M till after the decision of the District Munsif was pronounced, but having regard to the learned Judge's refusal to allow the plaintiff to produce another document as evidence before him on the ground that the plaintiffs were negligent in not having filed it before the Munsif, we think that he allowed Exhibit M to be produced in appeal because he was satisfied that the plaintiffs were not guilty of negligence in not having produced this particular document before. In the case in *Krishnama Chariar* v. *Narasimha Chariar* (2) the additional evidence was apparently

(1) (1907) 31 Bom. 381=34 I. A. 115 (P.C.).
(2) (1908) 31 Mad. 114.
(3) (1913) 36 Mad. 477=14 I. C. 140.
(4) (1915) 28 I. C. 640.
(5) A. I. R. (1915) Mad. 762=26 I. C. 50.
(6) (1911) 14 O. C. 327=12 I. C. 332.
(7) (1905) 27 All. 634=8 O. C. 317 (P.C.).

allowed by the Appellate Court in the very same irregular manner which was pointed out by their Lordships of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) as not permitted by law and hence that decision is not relevant.

The other questions argued before us are either questions of fact or points not taken up in the grounds of second appeal and we cannot entertain them.

There are, however, certain minor errors which have crept into the decree of the District Court (one of these minor errors also appears in the judgment) and we are entitled to correct them under O. 41, R. 33, even if some of the parties are not before us or have not appealed. These errors relate to the properties alienated to the defendants Nos. 2 to 9, 11, 12 and 16. As these alienations have been declared by both the Courts to be binding on the plaintiffs, the decree of the District Court will be modified by removing the words beginning with " that the plaintiff do pay Rs. 120 " up to the words " hereunder " the words " subject to the above limitations " and the words " after removal of the houses " up to the figures " 11 and 12 " and by inserting the words " other " between " the " and " suit properties. "

The appellants will pay three-fourths of plaintiff's costs and bear their own.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 540

SPENCER AND SESHAGIRI AIYAR, JJ.

Sundaram Iyer and *others*—Defendants—Appellants.

v.

Kulathu Aiyer—Plaintiff Respondent.

Second Appeal No. 237 of 1914, decided on 1st September, 1915, from the decree of Dist. Judge, Tinnevelly, in Appl. Suit No. 111 of 1913.

Madras Estates Land Act (1 of 1908), Ss. 3 (5), 5, 53, 111 and 112—Person can be land-holder though estate has terminated but he cannot have charge on holding for rent—He can distrain moveable but cannot attach holding.

A person to whom arrears of rent are due is a "landholder" notwithstanding the fact that his estate has terminated, but he has not a first charge on the holding. He can distrain the movable property or the trees on the holding of the defaulter but is not entitled to attach the holding itself. 2 Mad. 67 (P. C.) and A. I. R. 1914 P. C. 111, Foll. [P. 543, C. 2.]

M. D. Devadoss and *V. S. Govindachariar*—for Appellants.

S. Ramaswami Aiyar—for Respondent.

Spencer, J.—The question which we have to decide is, whether a landholder in Madras who has ceased to be a landholder can recover rent for the years when he was a landholder by bringing the *ryot's* holding to sale under the provisions of Chapter VI of Madras Act I of 1908. For Bengal it has been decided by the Privy Council with reference to the Bengal Tenancy Act that he cannot [Vide *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1)]. The Madras Estates Land Act is modelled on the Bengal Tenancy Act. Therefore, the above decision must have great weight with us so far as it is based on provisions which have been repeated in the Madras Act. There are, however, several distinctions between the two Acts. In Bengal a landlord must bring a suit and obtain a decree before he can bring to sale the tenant's holding. In Madras he can proceed summarily to attach the holding by notice to the defaulter served through the Collector, provided that he has exchanged a *patta* and *muchilika* with the *ryot* or tendered him such a *patta* as he was bound to accept. S. 5 of Madras Act I of 1908 and S. 65 of Bengal Act VIII of 1885 both declare that the rent shall be a first charge upon the holding. S. 109 of the Madras Act provides for the case of a conflict between the right of a landholder distraining produce and the right of a Civil Court decree-holder by declaring that the landholder's right shall prevail, but this does not apply to the case of a landholder selling the *ryot's* holding. As in Madras he does not occupy the position of a decree-holder, there can be no competition from other decree-holders for rateable distribution of the proceeds of the sale.

S. 148, clause (*h*), of the Bengal Tenancy Act, which declares that "notwithstanding anything contained in S. 232 of the Civil Procedure Code an application for the execution of a decree

(1) A. I. R 1914 P. C. 111=23 I. C. 632=41 Cal. 926 (P. C.).

for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him," does not find a place in the Madras Act. Thus one strong argument for the position that the right to sell the holding for arrears is vested in the landholder *qua* landholder is wanting. The Privy Council decision dwells on the anomaly which would arise by two persons, the landlord and the *ex*-landlord, having simultaneously a first charge on the tenure, and it goes so far as to class the *ex*-landlord as an outsider.

This anomaly would present no real difficulties in Madras. Under S. 111, a landholder cannot sell the holding for arrears until the revenue year in which they became due is over, and he has under S. 112 only one year in which he can take this step. Unless proceedings began by one landholder were still going on when the succeeding landholder wished to sell the holding for the rent of the following year, there would be no conflict of interests. Even after the sale of the holding the purchaser would be liable for the rent of the year in which he was in occupation. In case of a dispute between two or more rival claimants to the title of landholder, S. 3 (5) provides that the person who shall be deemed to be landholder for the purpose of this Act is the person whom the Collector may recognise or nominate as landholder. Again, when there is an intention to distinguish between landholders in possession and other landholders who have no subsisting interest, the Madras Act speaks distinctly of landholders in possession (*vide* S. 200). This may be used as a not very convincing argument that where the word "landholder" occurs in the Act without qualification, it includes persons out of possession.

I will now consider whether there are any other indications within the four corners of the Act that landholders have, as in Bengal, no right to proceed against their *ryots'* holding, unless their interest as landholders subsists at the time.

It is provided in S. 53 that the remedy of landholders against the *ryots'* moveables and holdings under Chapter IV of the Act is only available to those landholders who have exchanged a *patta* and *muchlika* with their *ryots*, or have tendered them such a *patta* as they were bound to accept, or there must be a valid *patta* or *muchlika* continuing in force. Can it be said that a valid *patta* or *muchlika* 'continues in force' between a *ryot* and landholder who has ceased to have any subsisting interest in the estate? If the answer is 'No, but he is a person who has exchanged or tendered a *patta* under the first part of S. 53,' we must then look to S. 52 and we find this section declaring that no *ryot* shall be bound to accept a *patta* for a period of more than one revenue year and that *pattas* and *muchalikas* accepted or exchanged for any revenue year remain in force only until the commencement of the revenue year for which fresh *pattas* are accepted or exchanged.

Under the old Act (VIII of 1865) it was recognised by the Privy Council in *Ramasami* v. *Bhaskarasami* (2) that there must be a subsisting relation of landlord and tenant for the exchange of *pattas* and *muchilikas*.

The result, therefore, is that distraint and sale are remedies open only to landholders who have at the time of exercising this power a valid *patta* in force between themselves and their *ryots*. I am aware that in his commentary on the Act, Mr. V. Ramadoss takes a different view, but the illustration which he gives to make the matter clear begs the whole question.

Again, in S. 3 (5) a landholder is defined as 'a person owning an estate or part thereof' and it is doubtful if he can lay claim to be called such a landholder merely because at some previous date he has owned an estate. If, as in this case, he is a lessee and comes within the description of a person "entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner," there can be no reason for imputing to the Legislature an intention to create in favour of such persons rights of greater extent and duration than those which are declared to be the property of owners who are landholders in their own right.

I am, therefore, of opinion that the lower Courts were right in their conclusions that, as the defendant was not the lessee for *Fasli* 1322, he could not attach the plaintiff's lands for the arrears of *Fasli* 1321. In such cases the only

(2) (1878-80) 2 Mad. 67 = 6 I. A. 170 (P.C.).

remedy left to the *ex*-landholder is the right of suing upon his contract for rent.

This second appeal is dismissed with costs. The memorandum of objections is also dismissed with costs.

Seshagiri Aiyar, J. – Vagikulam is an *inam* village belonging to the Vyasaraya *Mutt*. The defendant had a lease of it from the *mutt* for 10 years up to the end of *Fasli* 1321. His son became the lessee in *Fasli* 1322. The plaintiff, who is a *ryot* of the village, is alleged to have made default in the payment of rent for *Fasli* 1321. In or about September 1912, the defendant attached the plaintiff's holding for the arrears. This suit is to raise the said attachment. The only question for decision is whether defendant, who had ceased to be the lessee from July 1912, can attach the plaintiff's holding for the rent due to him while he was the lessee. There is no question that the defendant was a landholder upto the end of *Fasli* 1321. See *Bachu Perrajugar* v *Bhogireddy Subbarayudu* (3). It is also undisputed that the lessee who succeeded the defendant was a landholder at the time when the attachment was made.

After hearing the matter argued very fully on both sides and having regard to the grounds of the decision in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1), I have, though not without hesitation, come to the conclusion that the defendant had no right to enforce the attachment of the plaintiff's holding in September 1912. The reasoning of the Judicial Committee in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) applies to this case, although, as I shall presently show, the provisions of the Act which the Privy Council had to construe, differ in some material respects from the Estates Land Act. The definition of "landholder" would apply, in my opinion, to the defendant. The somewhat hypercritical comments of the learned Vakil for the respondent on the language of S. 3 (5) have not convinced me to the contrary. He laid stress upon the phrase "owning an estate" and argued that it predicates a subsisting interest at the time of the attachment. The next clause "entitled to collect the rent," would certainly apply to the man whose lease had expired but to whom arrears were still due, I do not think that the word "owning" was intended to negative the rights of persons who owned the estate at the time the arrears fell due. Another argument which belongs to the same category is the distinction sought to be made between *rent* and *arrears of rent*. I am of opinion that the defendant was a landholder when he attached the holding. One has only to look at S. 200 of the Act to see that the Legislature in Madras contemplated the existence of landholders with co-ordinate or mutually exclusive rights. It is different in Bengal. The definition of "landlord" (it is not landholder) is that he is "a person *immediately* under whom a tenant holds". This would undoubtedly exclude the defendant in Bengal. So far as I am able to see, there can be but one landlord at a time in Bengal, although there may be a proprietor and a landlord. There is no provision in the Bengal Tenancy Act corresponding to S. 200 of our Act which limits the power of the *landholder in possession*. Consequently the observation of the Judicial Committee in *Arthur Henry Forbes* v. *Maharaj Bahadar Singh* (1) that there can be but one landlord, cannot apply to conditions which obtain in Madras.

It seems to me that to hold that on the expiry of the lease the lessee has no right of distraint would render nugatory the provisions of the Act. Ss. 77 and 111 make it clear that distraint precedings should be commenced only if the rent due during the "next preceding 12 months remains unpaid." These sections do not impose the further restriction that at the time of the distraint, the distrainer must be the sole landholder. As proceedings of this kind are prohibited during the year that rent falls due, it seems to me that the Legislature contemplated action being taken by the person who had the estate when the arrears fell due. On the other hand, the Bengal Legislature confers the right to distrain only on the person in whom the estate vests at the time. S. 148 (*h*) prohibits an assignee of a decree from distraining unless the estate itself is transferred to him. There is no corresponding provision in the Madras Act. I do not think that the fact that in Bengal distraint proceedings have to be

(3) (1913) 36 Mad. 126=12 I. C. 171.

taken after decree in a Civil Court affects the question. My conclusion upon this portion of the case is that the defendant was entitled to distrain.

The third question is "could he distrain the plaintiff's holding?" It is here that the *ratio decidendi* of the Privy Council decision affects the defendant. In the Madras Act, there is a provision for the landholder distraining the general moveable property of the defaulter. See S. 77. In S. 121 of the Bengal Tenancy Act, which corresponds to S. 77, this power is not given. In Madras, (*a*) the holding, (*b*) the crops on the holding, (*c*) the ordinary moveable property of the tenant and (*d*) the trees on the holding, subject to specified exceptions, can be distrained. In Bengal the distraint can only be with reference to (*a*) and (*b*). Therefore, if in the present case, the defendant had distrained the moveable property or the trees, I would have held that the proceedings were not illegal; both the landholders having the right to distrain these properties. In the case of the holding itself, S. 5 of the Madras Act and S. 65 of the Bengal Tenancy Act give the landholder or the landlord, as the case may be, a first charge for the rent due. In Madras, the first charge extends to the crops on the holding as well, but although in Bengal the crops can be distrained, the rent is not made a first charge on them. This right of *first charge* must be taken to have been given only to the landholder who has a subsisting interest. [See *Ramasami* v. *Bhaskarasami* (2).] There would certainly arise a conflict of interests in the case of the holding being attached by two persons. The lessee that has passed out may not take action until the very end of the second year. The lessee in possession may commence proceedings in the beginning of his second year. As some time must elapse before the holding is brought to sale, the question will have to be dealt with whether both or either of them had the right to attach and whose rights should take precedence. It was argued that this dispute can be settled by the Collector under the second clause of S. 3 (5) of the Estates Land Act. I think the clause would only enable the Collector to recognise one of two claimants as the landholder. It would not authorise him to decide the question of priority regarding the rights of two landholders. The Judicial Committee in the Calcutta case pointed out in more than one place that the right to distrain the holding is dependant upon the right of first charge. It is also pointed out that "to acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure, must have the landlord's interests vested in him." Again we have this strong expression of opinion: "In whose decree and on whose application is the tenure to be sold? The question admits of only one answer, that it is the existing landlord alone who can execute the decree; the *ex*-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money decree, he has no remedy against the tenure itself."

The expression "existing landlord" and "*ex*-landlord" may not be appropriate to designate the position of the two landholders in Madras, but there is no doubt that the Judicial Committee have clearly and emphatically laid down that a holding can be sold only by the landlord who has a subsisting interest in the estate. The language of S. 127 of the Estates Land Act is in favour of this position. Under clause (*c*), if the holding is sold, the person to whom the arrears were due in the previous *Fasli* gets no portion of it. The arrears payable under clause (*b*) will go to the attaching landholder and not to the person whose interest has ceased. I must, therefore, conclude that the holding can be attached only by the landholder who has the estate still in his possession.

As I have discussed the sections at some length, I may re-state my conclusions thus:

1. A person to whom arrears are due is a landholder, notwithstanding the fact that his estate has terminated.

2. The law does not give him a first charge on the holding.

3. He can distrain the moveable property or the trees on the holding of the defaulter.

4. He is not entitled to attach the holding.

These propositions will reconcile the provisions of the Estates Land Act with

the decision of the Judicial Committee in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1). The second appeal must be dismissed with costs. The memorandum of objections must also be dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 544 (1)

SPENCER AND SESHAGIRI AIYAR, JJ.

Sreenivasa Aiyar—Petitioner.

v.

Nataraja Aiyar—Respondent.

Civil Rev. Pet. No. 627 of 1912, decided on 25th February, 1915, from the decree of Dist. Judge, South Arcot, in Civil Misc. Appeal No. 1 of 1912.

Civil P. C (5 of 1908), O. 47, R. 7—Order granting review is not appealable except on grounds stated in R. 7—Setting aside such order on other grounds is without jurisdiction—Civil P. C. (5 of 1908), S. 115.

An order granting a review is not appealable except on the three grounds specified in O. 47, R. 7. [P. 544, C. 1.]

Where a District Judge entertained an appeal against an order granting a review and set aside the order upon grounds other than those mentioned in O. 47, R. 7:

Held, that he had no jurisdiction to dispose of the appeal and his order could be interfered with by the High Court under S. 115. A.I.R. 1915 Cal. 283, Foll. [P. 544, C. 1.]

K. Jagannatha Iyer and *K. Balamukunda Iyer*—for Petitioner.

G. S. Ramachandra Iyer—for Respodent.

Judgment.—The District Munsif's order granting the review was not appealable except on the three grounds specified in O. 47, R. 7 of the Code of Civil Procedure. None of these grounds apply to this case. The District Judge, therefore, had no jurisdiction to dispose of the appeal on the grounds mentioned by him [*vide* the decision in appeal against Order No. 195 of 1910 on the file of the High Court, Madras, unreported, and the decision in *Hari Charan Saha* v. *Baran Khan* (1)]. We must set aside his order and restore that of the District Munsif. Parties will bear their own costs throughout.

S. N. R. K.

Petition allowed.

(1) A. I. R. (1915) Cal. 283; 25 I. C. 903= 41 Cal. 746.

A. I. R. 1916 Madras 544 (2)

SADASIVA AIYAR AND NAPIER, JJ.

Agustus Brothers—Plaintiffs.

v.

M. A. Fernandez—Defendant.

Referred Case No. 1 of 1914, decided on 31st August, 1915, made by the Sub-Judge, Cochin, in Sm. C. Suit No. 97 of 1913.

(a) Civil P. C. (5 of 1908), O. 2, R. 2—Splitting of causes of action is prohibited but every purchase made, forms distinct cause of action and separate suits are not barred.

O. 2, R. 2 prohibits only the splitting of claims arising out of the same cause of action. [P. 545, C. 2.]

Where a customer make distinct purchases on distinct dates, the merchant has got a distinct cause of action in respect of each purchase or set of purchases unless there is an agreement or settlement of accounts between the parties consolidating all these separate causes of action into one. [P. 545, C. 1 & 2.]

Where, therefore, in a suit for the balance of the amount due from the defendant on account of small purchases made by him on different occasions from the plaintiff's shop, it appeared that the plaintiff had previously sued for one portion of the claim in the Village Munsif's Court:

Held, that O. 2, R. 2, did not apply and the subsequent suit was not barred. A. I. R. (1914) All. 494 and A. I. R. (1915) Cal. 126, Foll. [P. 546, C. 2.]

(b) Civil P. C. (5 of 1908)—Applicability.

The provisions of the Civil Procedure Code, (1908) are inapplicable to Village Munsif's Courts. 13 Mad. 145, Foll. [P. 546, C. 2.]

Sadasiva Aiyar, J.—The facts which have led to this reference by the Subordinate Judge of Cochin in a Small Cause Suit in his Court, might be shortly stated thus: The defendant made purchases from the plaintiff's shop for small sums from time to time till 26th May, 1912, made part payments and had to pay Rs. 88-7-0 as balance on such purchases. The suit was brought in September 1913 for the recovery of this Rs. 88-7-0 and interest. The plaintiff had, at the end of 1912, brought a suit in the Village Munsif's Court of Cochin for the recovery of Rs. 2-4-0, being the price of one bottle of whisky purchased by the defendant in April 1912, this item of Rs. 2-4-0 being one of the several items of account in respect of the purchases made by the defendant up to the 26th May, 1912.

The lower Court has made this reference assuming that, if the first suit had been brought in an ordinary Civil Court instead of in the Court of the Village Munsif, O. 2, R. 2, corresponding to old S. 43 of the Civil Procedure Code, would be a bar to the present suit. O. 2, R. 2, says (omitting portions unnecessary for this case); "Every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action ;.....Where a plaintiff omits to sue in respect of,.....any portion of his claim, he shall not afterwards sue in respect of the portion so omitted."

I am not at all sure that where a customer makes distinct purchases on distinct dates, the merchant has not got a distinct cause of action in respect of each purchase or set of purchases. In *Beni Ram* v. *Ram Chandra* (1), it was held [doubting the decision in *Preonath Mukerji* v. *Bishnath Prasad* (2)], that when a debtor gave a *hundi* for Rs. 500 out of a debt of Rs. 4,000 and odd, and the creditor first brought a suit on the *hundi*, he was not precluded from maintaining a second suit for the balance due on account by reason of O. 2, R. 2. In the case of *Preonath Mukerji* v. *Bishnath Prasad* (2) [the soundness of the decision in which, was doubted in *Beni Ram* v. *Ram Chandra* (1)] the Court held that where a doctor got a promissory note for Rs. 700 for seven days' fees and continued to attend on the patient for six days more and then first brought a suit on the promissory note and recovered Rs. 700, he was barred by S. 43 [O. 2, R. (2)] from bringing a suit for the Rs. 600 due for the attendance during the remaining six days. In *Mandal & Co.* v. *Fazul Ellahie* (3), Jenkins, C. J., and Woodroffe, J., held that though the contract between the parties was contained in one and the same writing, if that writing expressly said that it related to two separate contracts (one relating to the delivery of cases of candles to be shipped in July 1908 and the other to the delivery of cases of candles to be shipped in August 1908), two separate suits can be maintained. I am aware that a merchant does not usually bring numerous separate suits against the same customer, each suit for the amount due on each purchase transaction. But that is because he is entitled under O. 2, R. 3, Civil Procedure Code to unite in the same suit several causes of action against the same defendant unless prohibited by Rr. 4 and 5 of O. 2. O. 2, R. 2, prohibits only the splitting of claims arising out of *the same cause of action* and if the cause of action in respect of purchase for Rs. 2-4-0 was different from the other causes of action in respect of other purchases and if there was no agreement (or settlement of accounts) between the parties which consolidated all these separate causes of action into one cause of action, I think that O. 2, R. 2, has no application and this reference is, therefore, incompetent.

Assuming, however, that the claim made in the Village Munsif's Court was on the same cause of action as that under which the present suit is brought, the question is whether O. 2, R. 2, is applicable when the first suit had been brought in the Village Munsif's Court. In *Mirkhan* v. *Kadarsa* (4) it was held that the Civil Procedure Code has no application to the Courts of Village Munsifs at all, as S. 6 of the old Civil Procedure Code provided that nothing in the Civil Procedure Code affected the jurisdiction or procedure of Village Munsifs and that hence the concurrent jurisdiction of the ordinary Civil Courts was not taken away by the provision in S. 15 of the Civll Procedure Code that "every suit shall be instituted in the Court of the lowest grade competent to try it."

Though, in the present case, the provision of the Civil Procedure Code to be considered is not S. 15, but O. 2, R. 2, the same reasoning applies. But the learned Subordinate Judge who has made this reference entertains a doubt as to whether the decision in *Mirkhan* v. *Kadarsa* (4) even as regards the applicability of S. 15 of the Civil Procedure Code, has not become inapplicable where the decision has to be under the new Code

(1) A. I. R. 1914 All. 494=26 I. C. 302=36 All. 560.

(2) (1907) 29 All. 256.

(3) A. I. R. 1915 Cal. 126=26 I. C. 209=41 Cal. 825.

(4) (1890) 13 Mad. 145.

owing to the change in the language of S. 6. S. 6 of the old Code of 1882 enacted (among other things) as follows: "Nothing in this Code affects the jurisdiction or procedure (*c*) of Village Munsifs or village *punchayats* under the provisions of the Madras Code or (*d*) shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits of its ordinary jurisdiction." S. 6 of the Code of 1908 says:— "Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction." The learned Subordinate Judge who has made this reference, thinks that the omission in the present Code of the words "affects jurisdiction or procedure of Village Munsifs, etc.," on which words the learned Judges who decided *Mirkhan* v. *Kadarsa* (4), relied, might make some difference, though he notices that S. 4 of the new Code of 1908 is more widely worded than S. 4 of the old Code. While S. 4 of the old Code saved certain specific Acts affecting the Central Provinces, Burma, Punjab and Oudh and the laws passed under the Indian Councils' Act of 1861, relating to suits between landlords and tenants and suits relating to partition of immovable property, S. 4 of the new Code of 1908 very generally says that "nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or..... any *special* form of procedure prescribed, by or under any other law." It was because the savings under S. 4 had been extended in the new Code, S. 6 of the new Code confined itself to the provision (*d*) of the old Code S. 6, namely, that ordinary pecuniary jurisdiction should not be exceeded. The learned Subordinate Judge says that S. 4 (1) of the new Code as regards this saving clause is somewhat differently worded from the saving clause of S. 6 of the old Code, and hence he is in doubt as to whether the ruling in *Mirkhan* v. *Kadarsa* (4) is applicable when interpreting S. 4 (1) of the new Code in the same manner as when interpreting S. 6 of the old Code. I do not find any material change in the wording and if there is any difference, the saving under S. 4 (1) of the new Code is larger in scope than that under S. 6 of the old Code and hence the *ratio decidendi* in *Mirkhan* v. *Kadarsa* (4), is *a fortiori* applicable to S. 4 (1) of the new Code.

Ameer Ali and Woodroffe are also of opinion; (See Commentary under S. 6) that it was in view of the extended scope of S. 4 of the present Code, the reproduction of Ss. 6 and 7 of the last Code (except as to the final paragraph, which is the present S. 6) has been considered unnecessary.

It is to be observed that in making this reference the Subordinate Judge has not clearly drawn up the point or points on which doubt is entertained by him (see O. 46, R. 1). However, taking it that the reference is whether O. 2, R. 2, applies when a suit is brought for the balance of a claim arising out of the same cause of action after a suit had been brought for one portion of the claim in the Village Munsif's Court, I would answer the reference in the negative.

Napier, J.—I agree that the suit is not barred by O. 2, R. 2, and think that the question is clear beyond doubt. S. 4 of the Code of 1908 is very wide in terms; therefore, the provisions of the Code are inapplicable to Village Munsifs' Courts. There are no provisions in the Code for these Courts corresponding to Ss. 7 and 8, which make certain sections applicable to Provincial Small Cause Courts and Presidency Small Cause Courts. Chapter IV to Chapter VI of the Madras Village Courts Act, I of 1889, provides complete procedure for such Courts, covering the same ground as the Civil Procedure Code does for its Courts. S. 18 enacts the very rule which the Subordinate Judge seeks for in the Civil Procedure Code. There are numberless sections of the Civil Procedure Code which are manifestly inapplicable to village Courts. The reference, therefore, must be answered in the negative.

S. N./R. K.

Reference answered in the negative.

A. I. R. 1916 Madras 547 (1)

SESHAGIRI AIYAR AND NAPIER, JJ.

Nagalinga Thevan——Appellant.

v.

Municipal Council, Kumbakonam—Respondent.

Letters Patent Appeal No. 153 of 1913, decided on 4th March, 1915, from the Judgment of Tyabji, J., in Civil Revn. Petn. No. 768 of 1917, dated 27th October, 1913.

Madras District Municipalities Act (4 of 1884), S. 196 (3)—Refusal of license.

Under S. 196 (3), a Municipality has absolute discretion to refuse to grant a license. 28 Mad. 520, doubted. [P. 547, C. 1.]

C. R. Subramania Iyer—for Appellant.

V. S. Govindachariar—for Respondent.

Facts.—The suit was for damages for illegal refusal to grant a license. The Subordinate Judge of Kumbakonam held that the Municipality had absolute power to refuse a license and dismissed the suit. The plaintiff then preferred a Civil Revn. Petn. (No. 768 of 1911) to the High Court and Tyabji, J., who heard the petition, dismissed the same. The present appeal is under S. 15 of the Letters Patent against that order of dismissal.

Judgment.—The Municipality has absolute discretion under S. 196 of the District Municipalities Act to refuse to grant a license. *Somu Pillai* v. *Municipal Council of Mayavaram* (1), which was decided with reference to S. 191, does not affect the present case.

In this latter section words enabling the Municipality to refuse an application are not to be found. We feel some doubt about the correctness of the decision in *Somu Pillai* v. *Municipal Council of Mayavaram* (1), but it is not necessary to consider it any further as the present case is not governed by it.

The appeal is dismissed with costs.

S. N./R. K.

Appeal dismissed.

(1) (1905) 28 Mad. 520.

A. I. R. 1916 Madras 547 (2)

SESHAGIRI AIYAR, J.

Ratna Pathan—Plaintiff—Petitioner.

v.

Para Sundaram—Defendant—Respondent.

Civil Rev. Pet. No. 330 of 1914, decided on 20th August, 1915, against the Judgment of Dist. Munsif, Chingleput, dated 30th September, 1913.

Civil P. C. (5 of 1908), O. 18, R. 13—What is not proper memorandum of evidence pointed out—Judgment based on evidence where memorandum of all witnesses not recorded is illegal.

In a suit tried by a Provincial Small Cause Court, the note appended to the judgment showed that five witnesses had been examined for the plaintiff and one for the defendant. The record, however, of the memorandum of evidence prepared under O. 18, R. 13, Civil Procedure Code, and found on the record, was incomplete and contained only the evidence of the witnesses Nos. 1 to 4 and the words 'I am' in the evidence of the 5th witness for the plaintiff and the evidence of the defendant's witness was not at all found:

Held, that the judgment based upon such evidence was illegal and ought to be set aside. 9 C. W. N. 420, foll.

[P. 547, C. 2 & P. 548, C. 1.]

O. P. Venkataraghavachariar—for Petitioner.

P. Chenchiah—for Respondent.

Judgment.—The point for decision was whether the defendant executed the note sued on. The conclusion came to by the District Munsif is that that document is not genuine. This is based upon the evidence of witnesses who, it is contended by the petitioner before me, all speak to the execution of the document. In the note appended to the judgment it is stated that six witnesses were examined, five for the plaintiff and one for the defendant. In the notes sent up to this Court the evidence of the sixth witness does not appear. As regards the fifth witness for the plaintiff, the only portion of his evidence is that which stops with "I am" and is not taken any further. It is contended before me that the Judge did not take an abstract of the deposition of the 5th witness, nor of the witness for the defendant. The learned Counsel for the counter-petitioner is unable to say whether this contention is well-founded or not. The records sent up to this Court do not show that the deposition of the defendant's witness was taken on any other day or that the

Judge made any note of his deposition. Under these circumstances I must regard this procedure of the District Munsif as illegal and as being opposed to O. 18, R. 13. [See also *Chethru Gope* v. *Sri Charan Bhagat* (1).] I must set aside the order of the District Munsif and direct him to record as required by law and to pass a proper decree in the case.

S. N./R. K.

Petition allowed.

(1) (1905) 9 C. W. N. 420.

A. I. R. 1916 Madras 548

WALLIS, C. J., AND SESHAGIRI AIYAR, J.

Kannepalli Bala Tripura Sundaramma Garu—Plaintiff—Appellant.

v.

Kannepalli Suryanarayana Garu and *others*—Defendants—Respondents.

Civil Appeal No. 175 of 1907, decided on 2nd December, 1914, from the decree of Dist. Judge, Ganjam, in Original Suit No. 31 of 1904.

Hindu Law—Partition—Mother is entitled to share in partition amongst sons—Her maintenance must be paid by sons and step-sons.

Under the *Mitakshara* a mother is entitled to a share in the family property when a partition takes place among the sons. Her right to maintenance is not against her sons alone, but against the estate possessed by her husband and which is the subject of partition among his sons.

Therefore, where a mother has got both sons and step-sons the maintenance ought to be paid by both of them. 12 B. L. R. 90; 31 Cal. 262 (P. C.); 5 M. H. C. R. 377; 35 Mad. 147; and A. I. R. 1914 Mad. 226, foll. 8 Mad. 107; and 16 Cal. 758, dist. [P. 548, C. 2 & P. 549, C. 1.]

P. Narayanamurthy—for Appellant.

K. V. L. Narasimham and *V. Ramesam*—for Respondents.

Judgment.—We are not prepared to increase the rate of maintenance and the allowance for utensils, but we think that Rs. 150 must be substituted for Rs. 100 for a house unless all the parties agree upon a house for her residence. The appeal is dismissed with proportionate costs of the 3rd respondent.

MEMO. OF OBJECTIONS IN APPEAL NO. 173 OF 1907.

It is argued for the 3rd respondent, the step-son, that the maintenance of his step-mother should be decreed only against her son and that he should not be made liable for any portion of it. This contention is opposed both to the text of Hindu Law and to the decided cases. Under the *Mitakshara* a mother is entitled to a share in the family property when a partition takes place among the sons. There are numerous cases in Bengal where in administering the *Mitakshara* law it has been held that a share should be set apart for the mother either by way of maintenance or as a portion of the inheritance, even though the partition takes place in the life-time of the father. See *Mahabeer Prasad* v. *Ramyad Singh* (1), *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (2), In Southern India in consequence of the view of the author of the Smrithi Chandrika in Chapter IV, Pl. 17, where he restricts the right of the mother to maintenance from out of the family estate, it has uniformly been held that in a partition of the family property all that a mother is entitled to is only maintenance from out of the family estate and not a share of the inheritance. It is, therefore, clear that the right to maintenance is not against her son alone but against the estate possessed by her husband and which is the subject of partition among his sons. This view has consistently been held in Madras. The earliest case is that which is reported in *Sivananja Perumal* v, *Meenakshi Ammal* (3). There it was decided that a step-son in possession of the *zemindari* was bound to pay maintenance to his step-mother notwithstanding the fact that her own sons obtained a share in the partible property of the *zemindari*. This has been followed in the decision reported as *Subbarayalu Chetty* v. *Kamalavalli Thayaramma* (4) and in the more recent case of *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* (5). These decisions refer to an additional ground that the word 'mother' includes the step-mother as well. Our attention has been drawn to the decision of the Full Bench in *Mari* v. *Chinnammal* (6), where for the purpose of inheritance the term 'mother' was held not to include the step-mother. That

(1) (1874) 12 B. L. R. 90.
(2) (1904) 31 Cal. 262; 31 I. A. 10 (P. C.).
(3) (1869-70) 5 M. H. C. R. 377.
(4) (1912) 35 Mad. 147 = 10 I. C. 347.
(5) A. I. R. 1914 Mad. 226 = 23 I. C. 264.
(6) (1885) 8 Mad. 107.

decision should not be read as holding that for all purposes under the Hindu Law, the term 'mother' would not include step-mother. The decision in *Hemangini Dasi* v. *Kedar Nath Chowdhry* (7) proceeds upon the interpretation of the text belonging to the Bengal School of Law and is no authority for deciding cases under the *Mitakshara*. We have no hesitation in holding that both on the texts of the Hindu Law and upon the decided cases, the Subordinate Judge was right in holding that the maintenance ought to be paid both by the son and by the step-son. The memorandum of objections should be dismissed with costs.

Appeal and Memo. of objections both dismissed.

(7) (1889) 16 Cal. 758=16 I. A. 115 (P. C.).

A. I. R. 1916 Madras 549 (1)

OLDFIELD AND SADASIVA AIYAR, JJ.

Krishniengar—Petitioner—Appellant.

v.

Viraraghavathathachariar and *another*—Defendants—Respondents.

Appeal No. 228 of 1913, decided on 13th July, 1915, against the order of Tempy., Sub. Judge, Ramnad, in Exe. Pet. Rev. No. 6 of 1912, dated 10th March, 1913.

Decree—Executability—Decree directing trustees of temple to perform a festival cannot be executed.

Where a decree directed certain trustees of a Hindu temple to perform a festival, it is not competent to the Court to issue any direction to the trustees to perform the same.

[P. 549, C. 1.]

T. Rangaramanujachariar—for Appellant.

M. A. Tirunarayanachari—for Respondents.

Judgment.—Petitioner holds a decree directing certain trustees to perform a festival. In the petition under disposal he moved the Subordinate Court to issue a direction to the trustees to perform the festival, the time for which was approaching. Neither that Court nor this has any power under the Code to issue such a direction in the circumstances. The appeal against order is dismissed with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 549 (2)

SADASIVA AIYAR AND HANNAY, JJ.

Sivapuram Venkatesam Chetty and *others*—Defendants—Appellants.

v.

Gonuguntla Subbiah—Plaintiff—Respondent.

Second Appeal No. 1266 of 1913, decided on 12th November, 1914, from the decree of Dist. Judge, Kurnool, in Appl. Suit No. 157 of 1913.

Adverse possession—Proof—Enjoyment of usufruct of fruit trees is sufficient proof of possession of site.

The only way of proving possession and enjoyment of the land out of which no profit is derived other than the usufruct of the fruit trees which stand thereon, is by proving the enjoyment of the trees, as in such cases the enjoyment of the usufruct cannot be separated from the enjoyment of the sites on which the trees stand.

[P. 549, C. 2.]

A. S. Visvanatha Iyer—for Appellants.

T. Prakasam—for Respondent.

Judgment.—Possession and enjoyment of sites on which fruit trees stand can be proved only by the enjoyment of the fruit of the trees if (as is found in this case) no other profit can be obtained out of the sites on which the trees stand. In such cases, the enjoyment of the produce of the trees cannot be separated from the enjoyment of the bits of sites covered by the trees. In other words, the only way in which possession of such sites could be established is by proving enjoyment of the trees and the proof of such enjoyment of the trees is the same thing as proof of enjoyment of the sites of the trees.

We are, therefore, unable to see anything in the contention that the plaintiff has not proved title by adverse possession to the sites of trees, though he might have proved adverse possession of the trees themselves.

The second appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 550 (1)

OLDFIELD AND SADASIVA AIYAR, JJ.

Subbanarayana Aiyar—Plaintiff—Appellant.

v.

Maya Thevan and *others*—Defendants—Respondents.

Appeal No. 64 of 1914, decided on 15th July, 1915, against the Appellate order of Dist. Judge, Madura, in Appl. Suit No. 216 of 1913.

Decree—Compromise—All terms of compromise incorporated in decree but made executable to extent of claim in suit—Other terms held could not be enforced in execution.

Where a compromise decree, while incorporating *in extenso* the terms of a compromise petition, adopts them and makes them executable only so far as they relate to the suit and where the terms not so adopted do not relate to the suit either directly or indirectly as indicating a *quid pro quo* on which the settlement of the plaint claim was based :

Held, that the terms so omitted to be adopted are not executable with the decree.

[P. 550, C. 1.]

K. S. Ganapathi Iyer—for Appellant.

K. N. Aiya—for Respondents.

Facts.—The parties to a suit entered into a compromise some of the terms of which were beyond the scope of the suit. The compromise petition containing all the terms of the compromise was filed in Court. The decree that was passed by the Court, while incorporating all the terms of the *razinamah*, adopted and made executable only such of the terms of the compromise as related to the suit. An application to execute such of the terms as were not made executable by the decree was dismissed by both the lower Courts. The plaintiff then appealed.

Judgment.—It is argued that the provisions in the compromise petition were made part of the decree and are, therefore, executable with it. But the decree, though it re-produces the *razinamah in extenso* adopts and makes executable its terms only so far as they relate to the suit against defendants. And we cannot find that the terms 7 and 8 relate to it either directly or, as the District Munsif held, indirectly as indicating a *quid pro quo*, on which the settlement of the plaint claim was based. In these circumstances we agree with the learned District Judge and dismiss the appeal against appellate order with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1916 Madras 550 (2)

SPENCER AND SESHAGIRI AIYAR, JJ.

Virupana Gowd and *others*—Accused—Appellants.

v.

Emperor—Prosecutor—Respondent.

Criminal Appeals Nos. 684 to 688 of 1914, decided on 23rd February, 1915, against the order of Addl. Sessn. Judge, Bellary, in Case No. 59 of 1914.

(a) Criminal P. C. (5 of 1898), Ss. 234, 235 and 136—Charge of entering a house with illegal object cannot be joined with offence of obstruction while going to report—Such misjoinder cannot be cured under S. 537.

The accused were charged of having entered the house of the third prosecution witness with a view to coerce the deceased person, and his brother to deliver certain promissory notes and receipts and, later in the evening, of having obstructed the complainant's party when they proceeded to prefer a complaint in regard to what the accused had done in the morning :

Held, that the accused could not be charged together for their action in the morning and in the evening in one and the same trial, and that the joinder amounted to an illegality which could not be cured by the application of S. 537 of the Criminal Procedure Code. [P. 553, C. 2.]

(b) Criminal P. C. (5 of 1898), S. 234—Community of purpose and continuity of aim makes series of acts one transaction.

Whether a series of acts forms the same transaction or not depends upon community of purpose and the continuity of aim.

[P. 551, C. 1 & 2.]

(c) Criminal Trial—Objection to misjoinder can be raised in appeal—Criminal P. C. (5 of 1898), Ss. 234 and 235.

An objection as to misjoinder of parties can be taken in the High Court, even if the same was not taken before the Sessions Judge.

[P. 552, C. 1.]

(d) Criminal P. C. (5 of 1898), S. 234—Duration between acts and employment of different persons to do them do not affect continuity—It is the purpose that determines whether transactions are separate or one—It is a question of fact—Transaction means completed act.

Courts have not to concern themselves with the ultimate object of the offender in determining the nature of the transaction. It is the immediate purpose of the attack that determines the character of the particular transaction. Mere interval of days will not disturb the oneness of the transaction nor necessarily the fact that different sets of persons were engaged on different occasions. If the aim of the accused on the

different occasions was directed towards effecting different purposes, the transactions are different. In each case it is a question of fact whether the acts are so connected together as to form part of the same transaction. [P. 553, C. 1 & 2.]

The word 'transaction' means a completed act. [P. 553, C. 2.]

T. Richmond, S. Ranganatha Aiyar, E. R. Osborne, K. Subba Reddi and *K. Pandalai*—for Appellants.

C. Sidney Smith—for the Crown.

Spencer, J.—An objection has been taken in appeal that the trial was illegal on account of misjoinder of charges and however much this result after a prolonged trial in the Sessions Court may be regretted, I have little hesitation in finding that the objection is sound and that the conviction of the accused must in consequence be quashed.

It is clear from the Privy Council decision in *Subramania Ayyar* v. *King-Emperor* (1) that if there has been a misjoinder, it will have the effect of vitiating the trial and cannot be cured by the application of S. 537, Code of Criminal Procedure.

In the present case there was an occurrence on the morning of June 29th, when certain persons are alleged to have come in an unlawful assembly armed with deadly weapons and besieged the house of prosecution witness No. 3 and thrown stones at prosecution witnesses No. 1, 2, 3 and the deceased, who were inside. There was another occurrence on the same afternoon when certain persons are alleged to have pursued and overtaken prosecution witnessess Nos. 1, 2, 3 and the deceased and murdered the latter individual when they were on their way to Jalibenchi to lodge a complaint about the morning occurrence before a Magistrate.

The question is whether the morning occurrence and the afternoon occurrence were parts of the same transaction within the meaning of S. 239, Code of Criminal Procedure. The test applied by this Court in *Choragudi Venkatadri* v. *Emperor* (2) and more recently in *Koduballi Chathu* v. *Emperor* (3) is to see whether the series of acts to be treated as forming the same transaction are connected together by the essential elements of community of purpose and continuity of action.

From the frame of charge it might be argued that a common purpose ran through the doings of the mob on the day in question, as the object of the rioters has been given in both of the first two Courts as to beat Dodda Basavanna Gowd, Basavanna Gowd and Chennana Gowd.

Even here it may be questioned from a narration of what occurred whether the real purpose of those assembled in the morning was not to obtain by use of criminal force certain promissory notes and a receipt from the possession of Dodda Basavanna Gowd, and whether the real purpose of those who pursued the prosecution party in the afternoon was not to prevent them by use of criminal force from complaining to the authorities.

Be this as it may, when we come to consider whether there was continuity of action between the morning and afternoon occurrences, we find that the Sessions Judge showed his consciousness that there was not such continuity. He felt the necessity of framing a separate count for the afternoon occurrence in which he charged the same persons for an offence under the same section of the Indian Penal Code in identically the same words, with the sole difference that the place of offence is given as Korlayondi in the first count and as the field of Jalibenchi in the second count. Again in paragraph 10 of his judgment he observes that when prosecution witnesses Nos. 1 to 3 set out in the afternoon, they had no expectation of being attacked again and received no warning from any in the village. The prosecution witnesses state that four persons came and pacified the rioters and then the accused went away and the witnesses came down, a note was made in writing of the names of the offenders, and the deceased took his meals in the 3rd prosecution witness's house. Prosecution 2nd witness after describing the acts which he witnessed in the morning stated: "Thus the morning affair ended," and everything tends to the conclusion that those matters would have ended for the time being, if the accused party had not somehow got

(1) (1902) 25 Mad. 61=28 I. A. 257 (P. C.).
(2) (1910) 33 Mad. 502=5 I. C. 847.
(3) 3 Cr. L. R. 382.

wind of the next move of the prosecution party, which was to go to a Magistrate and try to get them punished for what they had done in the morning. I have no doubt from what came out at the trial that the stone throwing and other assaults in the morning were acts complete in themselves. The procedure would moreover have been simplified by having separate trials and there would thereby have been no risk of the accused being prejudiced by the difficulty which the Judge and assessors may have felt in keeping distinct the part taken by each accused in the morning and the afternoon transactions and in having to decide whether any of those present on one occasion were also present on the other occasion. The easiest course would have been to try the accused first for the offences committed in the afternoon and to proceed with the trial for the offences committed in the morning after seeing the result of the first trial.

I am of opinion that the convictions must be quashed and a re-trial ordered.

Seshagiri Aiyar, J.—I agree. Mr. Richmond has taken the preliminary objection that the trial of the accused in this case offends against the provisions of Ss. 233 and 235 of the Code of Criminal Procedure. The objections to the joinder of charges was not taken before the Sessions Judge. It is unfortunate that the case should have been proceeded to trial without raising a formal objection. We cannot on that ground refuse to listen to the argument regarding misjoinder. In the case of *Krishnasami Pillai* v. *Emperor* (4) no objection was taken to the joinder of charges in the Sessions Court, and yet the learned Judges who heard the case allowed it to prevail.

The facts of the case as set out by the Sessions Judge are these :—On the morning of the 29th June, 1914 the accused and their servants, including certain Boyis whom the Sessions Judge finds to have taken part in the rioting, came to the house of the 3rd prosecution witness, where the deceased man and his brother and relations were already staying, with a view to coerce them into delivering certain promissory notes and receipts. They had a revolver with them and threatened to shoot P. W. No 3, if he refused to give up the papers. The complainants' party went inside the house and bolted the door. Subsequently at the mediation of strangers, among whom the 8th P. W. had taken a leading part, the accused's party left the place. Later, in the afternoon at about 1-30 P. M. the complainants' party started from the house of the 3rd P. W. to go to Jellabenchi with a view to prefer a complaint against the accused for their conduct in the morning. After they had gone about four furlongs from the house, they were attacked by the Boyis who were joined later on by accused Nos. 1 to 13. It was on this occasion that one of the complainants' party met his death.

The objection taken is that a single trial of the accused for offences which were committed on these two distinct occasions, namely, at or near the house of the 3rd prosecution witness in the morning, and half a mile away from the house in the afternoon, is illegal and that the whole trial is, therefore, vitiated. I have been forced to the conclusion that this contention is well founded. It was pointed out by a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Jwala Prasad* (5) with reference to S. 233, "that this section contains the general law. The reason of it is, that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Courts trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges." The Legislature has provided exceptions to the rule contained in S. 233; and those exceptions are so framed as to minimise the danger of prejudice to the accused by the joining together of more than one offence in the same trial.

S. 235, which is one of the exceptions to the general rule, permits of a joinder in cases where the acts are so connected together as to form one transaction. After giving my best consideration to the question, I am unable to hold that the occurrence in the morning and that in the afternoon are parts of the same

(4) (1903) 26 Mad. 125.

(5) (1885) 7 All. 174.

transaction. The motive which led to the morning attack was to secure possession of certain documents which the accused wanted. The motive which animated the second one, so far as one may gather from the probabilities and from evidence given by the 1st prosecution witness, was to prevent the attacked party from presenting a complaint to the Magistrate in reference to the occurrence in the morning. I am willing for purposes of argument to accept the finding of the Sessions Judge that the same men took part on both the occasions. Nonetheless I am unable to hold that there was any common aim in the two quarrels. In a rough way it may be said that the common object was to injure the complainants' party. But that is not the meaning to be attributed to clause (1) of S. 235. As was pointed out in *Emperor* v. *Sheruf Alli Allibhoy* (6). "There must be a continuity and community of purpose and the two occurrences should be so related to one another in point of purpose or as cause and effect or as principal and subsidiary action." Applying this test I am unable to say that there was a community of purpose between the two attacks.

As I have pointed out already, the purpose of the second attack was to stifle the prosecution. In a very instructive judgment Lord Blackburn in *Castro* v. *Queen* (7) points out that Courts have not to concern themselves with the ultimate object of the offender in determining the nature of the transaction. That object may be to cause injury in some way or other to the complainant. But it is the immediate purpose of the attack that determines the character of the particular transaction. In Lord Halsbury's Laws of England, Volume IX, page 342, it is said: "It is a well-established rule of practice that if different felonies, not being different ways of describing the same act, are charged in separate counts of one indictment, the Judge will put the prosecutor to his election to proceed and offer evidence on one charge only." The criterion in all these cases is, what was that the attacking party had in view as their immediate object. Mere interval of days will not disturb the oneness of the transaction nor necessarily the fact that different sets of persons were engaged on different occasions. But if the aim of the accused on the different occasions is directed towards effecting different purposes, the transactions are different. The view is supported by *Choragudi Venkatadri* v. *Emperor* (2) and by *Gobind Koeri* v. *Emperor* (8). The case nearest in point is that reported as *Laskari* v. *Emperor* (9). In *Mussalappu* v. *Emperor* (10) it was pointed out by Sir Arnold White, C. J., that in each case it is a question of fact whether the acts are so connected together as to form part of the same transaction, and referring to the illustrations. he says that the word "transaction," should be read in the ordinary sense of a completed act. I entirely agree with this view. In the present case the disturbance of the morning was completed as soon as the mediators intervened and pacified the parties. The second attack began because of an attempt on the part of the complainants' party to take the matter to the notice of the authorities. The second one cannot be said to be subsidiary to the first nor dependent upon it. They were two independent acts aimed at securing two independent purposes.

For these reasons I have come to the conclusion that the joinder of the two charges is illegal and as pointed out by Mr. Justice Ayling in *In re Anantha Padiyara* (11), the illegality cannot be cured and the conviction must be set aside. See also the judgment of myself and Mr. Justice Spencer in *Mala Mekalakati Subbadu, In re* (12). The Sessions Judge should be ordered to re-try the accused.

S. N./R. K.

Conviction set aside ; Re-trial ordered.

(6) (1903) 27 Bom. 135.
(7) 6 App. Cas. 229=50 L. J. Q. B. 497.
(8) (1902) 29 Cal 385.
(9) (1909) 4 I. C. 1.
(10) (1910) 6 I C. 242.
(11) A. I. R. 1915 Mad. 534=26 I. C. 143.
(12) (1915) 28 I. C. 522.

A. I. R. 1916 Madras 554 (1)

AYLING AND TYABJI, JJ.

T. R. Sundaram Aiyar—Plaintiff—Appellant.

v.

Subbammal and *another*—Defendants—Respondents.

Second Appeal No. 1170 of 1913, decided on 5th February, 1915, from the decree of Dist. Judge, Tinnevelly, in Appeal No. 265 of 1912.

Hindu Law—Maintenance—Absolute transfer of part of joint family property in lieu of maintenance is not invalid.

An absolute alienation of joint family property to a maintenance-holder in lieu of maintenance is not necessarily illegal.

[P. 554, C. 1.]

C. V. Anantha Krishna Aiyar—for Appellant.

A. Swaminatha Aiyar—for Respondents.

Judgment.—No authority has been adduced to support the appellant's contention that any absolute alienation of joint family property to a maintenance-holder in lieu of maintenance is necessarily illegal: and in the present case we must accept the finding of the lower Appellate Court that the alienation by Exhibit I was not excessive or unreasonable in the circumstances in which it was made.

The second appeal is dismissed with costs.

S. N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 554 (2)

OLDFIELD AND SADASIVA AIYAR, JJ.

Potla Subbarayudu—Defendant—Appellant.

v.

Ravilakshmayya and *others*—Plaintiffs—Respondents.

Appeal No. 48 of 1914, decided on 14th July, 1915, from the order of Dist. Judge, Guntur, dated 25th September, 1913, in Appl. Suit No. 22 of 1913.

Jurisdiction—Consent of parties does not entitle a judge to disregard law.

No agreement between the parties to a cause would enable a Court to dispose of a case in a manner not recognised by law or by authority.

[P. 554, C. 2.]

T. Ramachandra Rao—for Appellant.

P. Chenchiah for *T. Prakasam*—for Respondents.

Facts.—In Original Suit No. 290 of 1910 on the file of District Munsif of Narasarowpet, the defendant obtained a decree against the present plaintiff in respect of a sum of money and this sum was subsequently paid to the defendant by the plaintiff. In the judgment in a connected case, however, the plaintiff's right to sue to recover back the amount so decreed was stated as reserved. The plaintiff, basing his suit upon the said reservation, sued to recover back the amount so paid. The defence was *res judicata*. The District Munsif dismissed the suit, but the District Judge on appeal reversed the decree and remanded the suit for disposal according to law. The defendant appealed.

Judgment.—We regret that we cannot accept the learned District Judge's decision. The decree of the District Munsif in Original Suit No. 290 of 1910, which is pleaded as *res judicata*, is not, in our opinion, deprived of that character, because (with or without the parties' consent) the present plaintiff's right to sue again to recover back the amount then decreed and paid was referred to in the connected judgment as reserved. The fact, if it be one, that the present defendant agreed to that reservation could not be material. For no agreement between the parties could have enabled the Court to dispose of the case in a manner not recognized by the Civil Procedure Code or by authority.

The appeal must, therefore, be allowed, the lower Appellate Court's order of remand being set aside and the District Munsif's decision dismissing the suit with costs being restored.

There will be no order as to costs here and in the District Court.

S. N./R. K.

Appeal allowed.

A. I. R. 1916 Madras 555

SPENCER AND SESHAGIRI AIYAR, JJ.

In re *Avasarala Venkata Hanumantha Rao* and *another*—Accused—Petitioners.

Civil Revn. Petn. No. 605 of 1913, decided on 7th January 1915, to revise the order of Revenue Officer, Record of Rights, Pittapuram Estate, dated 24th June, 1913.

Criminal P. C. (5 of 1898), S. 476—Officer whose duty is to record tenant's rights is not court within S. 476—(Per Seshagiri Aiyar, J.) Persons exercising quasi judicial functions are not Courts.....test of Court or not is whether officer can record evidence and give decision.

An officer charged with the duty of recording tenants' rights under Chapter XI of the Madras Estates Land Act is not a "Court" within the meaning of S. 476 of the Code of Criminal Procedure. [P. 555, C. 2.]

Therefore statements made before him are not "evidence" and no prosecution for perjury will lie on such statements. 26 All. 382; 3 C. L. J. 133; 28 Cal. 471; 27 Cal 820; A. I. R. 1915 Mad. 360; 36 Mad. 72; foll. 24 Mad. 121; 17 Cal. 872, dist. from; 15 Mad. 138, diss. from. [P. 556, C. 1.]

Per *Seshagiri Aiyar, J.*—Persons exercising *quasi*-judicial functions should not be regarded as Courts, and the mere fact that an inquiry is necessary will not constitute the inquiring officer a Court. The test to be applied for ascertaining whether an officer is a Court or not is to see whether there is a power to record evidence and to come to a judicial determination on the evidence so recorded. [P. 557, C. 1.]

P. Narayanamurthi—for Petitioners.

Government Pleader—for the Crown.

Facts.—One Mr. Venkatanarayana Naidu was appointed by the Government to survey and to prepare a Record of Rights in the *zemindari* of Pittapur. The notification, dated 3rd May, 1910, published in the Fort St. George Gazette Supplement for June 1910, merely appointed him to be a Revenue Officer for the purpose of making a survey of the estate and for preparing a Record of Rights in respect of the same and while declaring what the record so prepared was to show, did not invest the officer so appointed with power to record evidence or with the powers of a Survey Officer under the Madras Survey and Boundaries Act, IV of 1897, nor did it authorise him to settle the rate of rent. Acting under the said notification, the said officer entered the name of one *V* as an occupancy tenant. The first petitioner (the proprietor) objected to the said entry, as otherwise the matter would become final under S. 166 of the Madras Estates Land Act. In the course of an inquiry regarding this objection certain statements were made by the petitioners. The Survey Officer thought that these statements were false and took proceedings under S. 476 of the Criminal Procedure Code against the petitioners. The latter thereupon preferred this civil revision petition under S. 15 of the Charter Act.

ORDER.

Spencer, J.—I am of opinion that a Revenue Officer preparing a Record of Rights under Ss. 164 to 167 of the Madras Estates Land Act is only discharging an executive function of Government and is not a Court within the meaning of S. 476 of the Code of Criminal Procedure.

In *Muhammad Subhan-ullah* v. *Secretary of State for India in Council* (1), it was held that a Settlement Officer preparing a Record of Rights was not a Court, but was simply an executive officer acting in his executive capacity.

In *Nasarulla Mia* v. *Amiruddi* (2) and in *Kurban Ali* v. *Jafar Ali* (3), the powers of a Revenue Officer disposing of an objection under S. 103A of the Bengal Tenancy Act, which corresponds closely in wording to S. 166 of the Madras Estates Land Act, were considered, and it was held that the legal effect of proceedings taken under this section was that the Revenue Officer's order was not a judicial order, was not open to appeal and would not operate as *res judicata*.

S. 106 of the Bengal Tenancy Act provides for the institution of suits before Revenue Officers preparing Records of Rights and for suits instituted before them being transferred by them to a competent Civil Court for trial. S. 107 further provides that they shall adopt the procedure of the Code of Civil Procedure in trying such suits and that their decisions shall have the force and effect of a decree of a Civil Court.

In contradistinction to this it may be observed that the Madras Act provides in S. 173 for institution of suits in the Civil Court having local jurisdiction, whenever the correctness of the Record of Rights is impugned in certain particulars.

(1) (1904) 26 All. 382.
(2) (1906) 3 C. L. J. 133.
(3) (1901) 28 Cal. 471.

In fact a Revenue Officer proceeding under Chapter XI of the Madras Estates Land Act is not anywhere referred to in that Act as a Court in the manner that Collectors and other Revenue Officers who hear suits and applications specified in the Schedule, are described in S. 189 and elsewhere as Courts.

Mr. Grant relies on the provision in S. 164 (3) that the survey made by Revenue Officers proceeding under this Chapter shall be made under the Madras Survey and Boundaries Act, 1897, and on the provision in S. 29 of that Act applying the procedure of the Code of Civil Procedure for enforcing the attendance of witnesses and for the recording of evidence, and also on the definition of "Court" in S. 3 of the Evidence Act.

He has referred us to several decisions such as *Raghoobuns Sahoy* v. *Kokil Singh* alias *Gopal Singh* (4), *Atchayya* v. *Gangayya* (5) and *Queen-Empress* v. *Munda Shetti* (6), in which officers authorized to receive evidence and decide matters on evidence have been treated as Courts.

But the notification, dated 3rd May, 1910, in the Fort St. George Gazette Supplement for June, under which the Revenue Officer, who passed the order under S. 476 now under consideration, was appointed, does not invest him with powers to record evidence, nor with the powers of a Survey Officer under Act IV of 1897. It merely appoints him to be a Revenue Officer for the purpose of making a survey of the Pittapuram estate and for preparing a Record of Rights in respect of the said estate and it goes on to declare what particulars the Record of Rights shall show.

The said officer's order directing the prosecution of the petitioners for giving false evidence was, therefore, in my opinion *ultra vires* and must be set aside.

Seshagiri Aiyar, J.—I entirely agree.

By a Notification dated the 3rd May, 1910, Mr. Venkatanarayana Naidu was appointed to survey and to prepare a Record of Rights in the *zemindari* of Pittapur. It is conceded that this notification does not empower the officer to administer oath and to record evidence. In pursuance of this notification the officer entered the name of one Venkataswami Gadu as the occupancy tenant of a holding. This was objected to by the 1st petitioner, the proprietor. And the Survey Officer came to the conclusion that the petitioners had made false statements regarding the right of Venkataswami Gadu. He took action under S. 476 of the Code of Criminal Procedure and directed the prosecution of the petitioners. The point for consideration is whether an officer recording rights under the Estates Land Act is exercising the functions of a Civil or Revenue Court so as to enable him to take action under the Code of Criminal Procedure.

I must answer this question in the negative. Under Chapter XI of the Estates Land Act, the local Government may empower a person to conduct three classes of operations: (*a*) to survey the fields; (*b*) to enter the names of the tenants in respect of the fields surveyed as occupancy *ryots*; and (*c*) to settle the rate of rent. In this case, the officer had no authority to settle the rate of rent. The false statement is alleged to have been made in the enquiry regarding the Record of Rights. Under S. 166 of the Act, if the Record of Rights is not objected to, "it shall be conclusive evidence that the record has been duly made." No right to contest the record is given either by bringing a suit in that behalf or by preferring an appeal. The right of suit given by S. 173 does not affect the present question. S. 167 lays down in clause (3) that the entry shall be evidence of the tenants' rights. Neither S. 166 nor S. 167 gives power to the officer to take evidence. *Prima facie*, therefore, the entry as tenant is a purely administrative one and the officer cannot be said to be exercising the functions of a Civil or Revenue Court. The decisions in *Muhammad Subhan-ullah* v. *Secretary of State for India in Council* (1) and in *Nasarulla Mia* v. *Amiruddi* (2), which relate to the construction of similar provisions in the Tenancy Acts of the United Provinces and Bengal, lay down that the officer entrusted with such duties is not acting judicially, but only in his executive capacity. The learned

(4) (1890) 17 Cal. 872.
(5) (1892) 15 Mad. 138.
(6) (1901) 24 Mad. 121.

Public Prosecutor draws attention to the fact that the officer was also performing the duties of a Survey Officer, and as under clause (3) of S. 164, he is authorised as such to exercise all the powers contained in the Madras Survey and Boundaries Act, he must be deemed to have acted as a Court. In the first place, S. 29 of the Boundaries Act, which is relied upon, lays down that the power to take evidence must be either specially or generally conferred. There is no such authorisation in this case. In the second place, whatever may be the officer's duties in regard to survey, in recording rights he is not given power to administer oath to witnesses.

The fact that in S. 195 of the Code of Criminal Procedure the Legislature exempts the offices of the Registrar and of the Sub-Registrar from the designation of Courts strengthens my view that persons exercising *quasi*-judicial functions are not generally to be regarded as Courts. The decision in *Queen-Empress* v. *Munda Shetti* (6) proceeds on the language of Act III of 1869, which specially empowers the Tahsildar to take evidence during the course of the enquiry and to give his decision upon such evidence. The decision in *Atchayya* v. *Gangayya* (5) is no longer law and I do not think that the *obiter dicta* of some Judges in that case can be relied upon. On the other hand it has been laid down that the mere fact that an inquiry has to be made will not constitute the inquiring officer a Court. In *Durga Das Rukhit* v. *Queen-Empress* (7), it was decided that an officer enquiring into the value of property under the Land Acquisition Act was not a Court. The proper test for ascertaining whether an officer is a Court or not has been stated in *Queen-Empress* v. *Munda Shetti* (6). There must be power to record evidence, and to come to a judicial determination on the evidence so recorded. Myself and Mr. Justice Ayling had to consider a similar question in the case of *Vijiaraghavalu Pillai* v. *Emperor* (8). Applying the tests suggested in that case and *Nataraja Iyer, In re* (9), I am of opinion that an officer charged with the duty of recording tenant rights in a *zemindari* under Chapter XI of the Estates Land Act is not a Court within the meaning of S. 476 of the Code of Criminal Procedure.

S.N./R.K.

Petition allowed.

(7) (1900) 27 Cal. 820.
(8) A. I. R. (1915) Mad. 360=25 I. C. 345.
(9) (1913) 36 Mad. 72=16 I. C. 755.

A. I. R. 1916 Madras 557

SANKARAN NAIR AND SPENCER, JJ.

Kallepalli Venkatarama Raju—Plaintiff—Appellant.

v.

Kallepalli Bapamma and *another*—Defendants—Respondents.

First Appeal No. 61 of 1912, decided on 26th October, 1914, from the decree of Tempy., Sub-Judge, Kistna, in Original Suit No. 12 of 1910.

Hindu Law—Adoption—Consent—Benefit of family and not personal consideration should be grounds of refusal of consent by sapinda—Where consent is wrongly refused remote sapinda's consent validates adoption.

A *sapinda* who is called upon to give his consent to an adoption by a widow ought not to be guided by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family, especially that part of it which the widow represents.

[P. 558, C. 2.]

Therefore, an adoption made with the consent of other *sapindas* is valid, where the nearest *sapinda* refuses on the ground of losing his right of inheritance. 23 Mad. 486; 2 Mad. 270 (P. C.); 2 Mad. 202; 30 Mad. 50 (P. C.) foll.

[P. 558, C. 2.]

T. Prakasam—for Appellant.

V. Ramadoss—for Respondents.

Spencer, J. This is a suit to set aside an adoption. Two questions arise for decision: (1) whether the alleged adoption of the 2nd defendant is true; and (2) whether the refusal of the plaintiff to give his consent to the adoption invalidated any adoption made by the 1st defendant as the widow of the deceased Lakshmipati Raju.

Although the adoptive mother, the 1st defendant, has in this suit taken the part of the plaintiff and denied the *factum* of the adoption, I have no doubt that the Subordinate Judge was correct in the finding that the 2nd defendant was adopted. All the documents produced in the case from 1906 onwards describe him as an adopted son. Exhibit III is a promissory note executed by the 1st defendant as guardian of her adopted son, the 2nd defendant, which purports to have been attested by the plaintiff. D. W. No. 5

proved the fact that the plaintiff attested this promissory note executed in his (witness's) favour. The plaintiff, in the witness-box professed himself unable to say whether the signature in Exhibit III was his or not. The 1st defendant made several statements before the public authorities acknowledging that she had adopted the 2nd defendant, and when her attention was drawn to these statements in her examination she flatly denied having made the statements. It is unnecessary to refer to the oral evidence, as, in our opinion, there is overwhelming proof that the adoption is true.

On the second point, the plaintiff is the divided brother of the late Lakshmipati Raju, and as such is the nearest reversioner entitled to succeed to his properties after his death. He states that he was not asked by the 1st defendant to give his consent to the adoption of a boy. On the evidence of P. W. No. 5 and D. W. No. 4, I must take it that this denial is not true. D. W. No. 4 states that the plaintiff was asked to give his son in adoption and that he refused, as the son was his only son. P. W. No. 5 states that the reason for the plaintiff's refusing his consent was that he said that he would forfeit the right to property which he would otherwise get. The Subordinate Judge treats this as a refusal based on "an evil intention to usurp the property after the death of the 1st defendant." Without using such language to characterise the refusal, we may see whether the refusal was based on improper grounds.

In *Venkatakrishnamma* v. *Annapurnamma* (1) it was held that, if a *sapinda* refused to consent but withheld his grounds for such refusal, the refusal would not affect the adoption; and also if the assent was withheld from improper considerations, such dissent would be of no avail to the party relying on it. In *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (2) the Privy Council held that the consent of a *sapinda* given on the ground that by consenting he gained some material profit from the adoption was improper. On the same principle, it would appear that a refusal on similar grounds might equally be condemned as an improper refusal. In *Parasara Bhattar* v. *Rangaraja Bhattar* (3) the test applied was whether the refusal was "from interested or improper motives or without a fair exercise of discretion." The object of getting the consent of *sapindas* to adoption is declared in *Venkamma* v. *Subramaniam* (4) as being to get an independent judgment on the expediency of the proposed adoption. This being so, there can be no doubt that a *sapinda* who is called upon to exercise his discretion ought to be guided not by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family, especially that part of it which the widow represents. Applying such principles to the facts of this case, it is immaterial that the plaintiff did not give his consent to the adoption.

Other *sapindas* executed a document, Exhibit X, which fully authorized the 1st defendant to adopt the 2nd defendant. Only Chinna Bapi Raju was not a party to this document; his brother Peda Bapi Raju signed it; and there are indications that these two brothers were undivided at the time, the elder, Peda Bapi Raju, being the natural father of the boy.

I am of opinion that the Subordinate Judge rightly found that the adoption set up by the 2nd defendant was valid. The appeal is dismissed with costs.

Sankaran Nair, J.—I agree.

S. N./R. K.

Appeal dismissed.

(1) (1900) 23 Mad. 486.
(2) (1878-80) 2 Mad. 270; 7 I. A. 173 (P. C.).
(3) (1878-80) 2 Mad. 202.
(4) (1907) 30 Mad. 50=34 I. A. 22 (P. C.).

A. I. R. 1916 Madras 558

COUTTS-TROTTER AND KUMARASWAMI SASTRI, JJ.

Ayyakutti Mankondan—Plaintiff—Appellant.

v.

Periyasami Kavandan and *others*—Defendants—Respondents.

Second Appeal No. 1284 of 1912, decided on 14th April, 1915, against the decree of Dist. Judge, Madura, in A. S. No. 376 of 1910.

(a) Transfer of Property Act (4 of 1882), S. 83—Amount found due means amounts determined by Court and not whole amount stipulated.

The words "amount remaining due on the mortgage" in S. 83 of the Transfer of Property Act mean the amount which a Court finds as due, and not the whole amount stipulated for payment under the terms of the mortgage document.

Searles v. *Sædgrave*, 5 El. & Bl. 639; 17 I. C. 368; dist. [P. 559, C. 2.]

Where, therefore, a mortgage-bond provides for payment of a higher rate of interest on default, the deposit of the amount found by the Court to be due under the mortgage is sufficient to entitle the mortgagor to the benefit of S. 83 of the Transfer of Property Act. [P. 560, C. 1.]

(b) Transfer of Property Act (4 of 1882), S. 60—Piecemeal redemption cannot be enforced.

A mortgagee is not bound to be redeemed piecemeal. [P. 560, C. 1.]

T. R. Venkatarama Sastri—for Appellant.

T. V. Muthukrishna Aiyar — for Respondents.

Coutts-Trotter, J.—In this case the plaintiff had created two incumbrances on his land, one a usufructuary mortgage and the other a hypothecation. The plaintiff, being desirious to pay off his mortgage and recover his property, availed himself of the procedure under S. 83 of the Transfer of Property Act and paid the amount due under the mortgage, namely, Rs. 800, into Court on the 8th of October 1908. The 1st defendant declined to receive that amount and claimed that the plaintiff was bound to deposit also the amount due under the hyphothecation bond. Accordingly the plaintiff deposited the sum of Rs. 676-7-6 in respect of the hypothecation bond and tendered the two sums to the 1st defendant. A notice was sent to the 1st defendant, who put in no appearance in Court and did not receive the money. The question which arises is this. The hypothecation bond was in respect of the principal sum of Rs. 300 with interest at Rs. 1-6-0 per cent. a month, and also provided that if it was not paid off within the prescribed period, a year, then simple and compound interest at Rs. 2 per cent. should run from the date of default. Now the plaintiff, when he paid the money into Court under S. 83 of the Transfer of Property Act, did not pay at the penal rate of interest, but he paid only compound interest at the rate of Rs. 1-6-0 as from the date of default, and when the Court came to determine what was due, the Court held that that amount was enough and that he had duly discharged the claim of the 1st defendant.

It has been contended before us that, notwithstanding the fact that the amount paid in was the amount that was found due, the payment and tender were bad on the ground that it was not for the debtor to speculate as to what reduction the creditor would accept or the Court would make from the full letter of the bond, but that he must pay what is expressed to be due on the face of the instrument and get back any portion if he can. It is not apparent, and the respondent has not been able to suggest, that there is any legal means by which he would be able to get it back. In support of the proposition some English cases about tender were cited and among them was *Searles* v. *Sadgrave* (1). There in respect of an entire debt of £82, a tender was made of £55-6-0, which was arrived at by deducting a sum of money due in respect of a cross-claim between the parties. The Court held that the tender to be good must be of the whole debt in respect of which it was tendered and that the debtor was not entitled to deduct the set-off from the amount of the debt. Reliance was further placed upon the case of *Vencatrama Aiyar* v. *Rangasawmi Aiyangar* (2). There it was held that where a tender was made of four-fifths of the mortgage amount where a partition was sought, the tender was bad, because the parties were not agreed as to what the proper proportions of division would be if a partition were made. That seems to be quite different in principle to the present case and not in any way to cover it. The words of S. 83 of the Transfer of Property Act are quite clear and they enact that "the mortgagor or any other person entitled to institute such suit may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage." Here, the amount legally due was what the Court found it to be and that was the amount which the plaintiff paid into Court. No question arises of any attempt to set off or stop any balance. That which

(1) (1855-56) 5 El. & Bl. 639=25 L. J. Q. B. 15.

(2) (1912) 17 I. C. 368.

the plaintiff tendered was the debt and the whole debt as it was ultimately found to be, and the fact that the instrument sought to provide for, and the defendant sought to exact in accordance with it, a larger sum does not, in my opinion, affect the result that what the plaintiff tendered was the whole amount which was due and owing by him. I am, therefore, of opinion that the interest ceased to run at any rate as from the date when both the bonds were redeemed and paid off, namely, the 29th January, 1909 and that as from that date the plaintiff should have mesne profits in respect of the property. He sought to go further and claimed mesne profits as from the 9th October, 1908, the date when he paid off the original mortgage for Rs. 800. What he argued was that as he discharged the usufructuary mortgage-debt, his right to mesne profits would accrue from that date as the hypothecation bond would not entitle the mortgagee to possession. This seems really an ingenious attempt to get round the decision of the Full Bench given the other day (1st April, 1915) in *Subramania Aiyar* v. *Balasubramania Aiyar* (3), which decides that a mortgagee is not bound to be redeemed piecemeal. We are bound by that decision, and its principle is fatal to the appellant's contention.

Therefore, the appeal is allowed and mesne profits will be decreed to the appellant as from the 29th January, 1909 until delivery of possession.

The amount of mesne profits will be determined by the Court of first instance. Each party will give and take proportionate costs.

Kumaraswami Sastri, J.—I agree.

S. N./R. K.

Appeal allowed.

(3) (1915) 30 I. C. 317.

A. I. R. 1916 Madras 560

SANKARAN NAIR AND OLDFIELD, JJ.

Pothi Naicken—Plaintiff—Appellant.

v.

R. Naganna Naicker and *others*—Defendants—Respondents.

Appeal No. 119 of 1912, decided on 15th February, 1914, against the decree of Dist. Judge, Madura, in Original Suit No. 12 of 1910.

(a) Registration Act (16 of 1908), S. 17—Document creating severance in status of joint family is not compulsorily registrable.

Per *Sankaran Nair, J.*—A document merely creating a severance in status among the members of a joint Hindu family does not fall within the provisions of the Registration Act requiring registration. It does not in itself create an interest in property and if any is created, it is by operation of rules of Hindu Law and not by virtue of the instrument. 9 All. 108 (F. B.); 27 Mad. 43; 15 Mad. 336; 35 Mad. 63; and 6 I. C. 346, ref. to. [P. 564, C. 2.]

(b) Registration Act (16 of 1908), S. 17—So far affecting immovable property document must be registered.

Per *Oldfield, J.*—A document which effects a severance in status is not admissible to establish partition as regards immovable property without registration, though it may be operative as regards movables. [P. 567, C. 2.]

(c) Hindu Law—Partition can be effected by declaration—It must however be clear and irrevocable.

Per *Sankaran Nair, J.*—It is open to a member of an undivided family governed by the *Mitakshara* Law to effect a separation between himself and the other members of the family by a declaration to that effect made to other members, but the declaration must be clear and in such a form that it is not open to him afterwards to say that he still continues to be a member. 35 All. 80 (P.C.) foll. 3 W. R. 41; 8 W. R. 82; 14 W. R. 340; 4 Cal. 425; 5 Cal. 474; Ref. to. 25 Mad. 149; 35 Mad. 239, not foll. [P. 563, C. 1.]

(d) Hindu Law—Joint family—Joint tenancy distinguished.

The differences between the joint tenancy of English Law and the joint Hindu family as known to *Mitakshara* Law pointed out. [P. 564, C. 1 & 2.]

(e) Hindu Law—Partition—Minor's mother competent to consent to partition from uncle—Consent is not vitiated by probability of sole major member's death.

Where an uncle and his minor nephew formed members of an undivided Hindu family, the mother of the minor is competent to consent to a partition on his behalf with his uncle. The fact that the uncle was at the time of consent very ill and about to die will not vitiate the consent, and the law will not recognise the contingency or probability of a person's death as a reason for not consenting to a demand for partition which a person is entitled to claim. [P. 563, C. 1.]

K. Srinivasa Aiyangar and *A. Krishnaswami Iyer*—for Appellant.

S. Srinivasa Iyengar and *G. S. Ramachandra Iyer*—for Respondents.

Sankaran Nair, J.—This is an appeal by the plaintiff from a decree passed by the Subordinate Judge of Madura, dismissing his suit for a declaration that a partition-deed alleged to have been executed between the deceased Subba Naicker, his paternal uncle, and Nagammal, the mother of the minor, plaintiff acting on his behalf, on the 8th December, 1907, and a will alleged to have been executed by Subba Naicken on the 9th December, 1907 are not genuine; and in the alternative, that they are invalid and ineffective to affect the plaintiff's right of survivorship to the joint family properties. Ramasami Naick, the plaintiff's father, and Subba Naicken, his brother, were undivided brothers. Ramasami Naick died on 27th December, 1906 leaving his widow, Nagammal, and a minor son the plaintiff. She continued to live in the family house with Subba Naicken. On the 7th December, 1907 she executed a power-of-attorney in favour of her *sambandhi*, Ramasami Naicken, who is the defendants' 2nd witness. The power-of-attorney was executed in order to effect a division of her son's share of the joint family property with Subba Naicken. The partition, however, was not carried out. Subba Naick was ill for some time and he went to Mallankinar, the village of his brother-in-law, Kuppusami Naicken, in December 1907. A telegram was sent to the Sub-Magistrate of Aruppukottai by one Vyravan Asari, P. W. No. 5, to the effect that Kuppusami Naicken had carried away the properties of Subba Naicken which were deposited for safe custody at Aruppukottai. The Station House Officer went to Mallankinar and took a statement from Subba Naicken on the 4th December. Subsequently the Magistrate also came to the village and took another statement on the 7th. Subba Naicken went back to his village, Ramanujapuram, and died there either on the night of the 9th or on the 10th. The partition-deed is dated 8th. It consists of two parts Exhibit III and Exhibit III (*a*). Exhibit III recites that as the family properties valued at Rs. 80,000 had been divided in the presence of *Panchayatdars* into two equal moieties. "Our connection shall hereafter be only by relationship, but we shall have no monetary concern in respect of these properties." It purports to have been signed by Subba Naicken and by Nagammal by affixing her mark. It is attested by 12 witnesses and by the writer. Attached to that Exhibit III are certain sheets of paper which contain the schedules of properties. They are admittedly not signed either by Subba Naicken or Nagammal. They are attested by about fifteen witnesses. The District Judge has held that Exhibit III was signed by Subba Naicken and Nagammal, that Exhibit III (*a*) was not written in Subba Naicken's life-time and, therefore, no effect can be given to it: and he finds, therefore, that Exhibit III effects only a division in status. He finds the will is genuine, but it is inoperative because there was no partition of properties before the death. He accordingly dismissed the suit. After Subba Naicken's death the will was presented for registration and though the Registrar found that Exhibit III was genuine, he was of opinion that under the provisions of the Registration Act the document could not be registered as it did not contain any particulars of properties. A suit was then filed (Original Suit No. 26 of 1909, Subordinate Court of Madura) to get the document registered. The Subordinate Judge and in appeal the High Court held that Subba Naicken's widow was not competent to present the document for registration, the Registrar was right in refusing to register the document. The first question that arises for determination is whether Exhibit III is genuine. The evidence adduced on behalf of the defence shows that about ten days before Subba Naick's death he went to Aruppukottai where he had kept some property in an iron safe and his cash box in charge of one Sankara Kumara Pillai. He was accompanied by the plaintiff's mother, Nagammal, P. W. No. 1 his own wife, Seethammal, D. W. No. 1, plaintiff, Nagammal's brother, P. W. 6, and Kuppusami Naicken who is Seethammal's brother. He went to Mallankinar for treatment taking the safe with him. There the Station House Officer and Sub-Magistrate came to him and took certain statments from him. After they left he told his friends and relatives that even during his life-time his enemies were creating trouble and, therefore, it was in the interests of all parties that there should be a partition. Nagammal had in

the meantime left for Ramanujapuram. She came back to Mallankinar. According to Ramasami Naick, Subba Naick had sent for her and told her that there would be trouble about her son's property after his death and she had better effect a partition. Nagammal agreed to this. Certain persons were sent for and the partition-deed, Exhibit III, was drawn up. Subba Naick signed it and Nagammal touched the pen, the writer writing her name. After that the lists, Exhibits III (*a*), were prepared but Subba Naick and Nagammal did not sign, as the former said as it was *panchayatdars* that divided the property, it was enough if they signed and they alone accordingly signed. There is considerable body of evidence in support of this case. Seethammal, the widow of Subba Naick, D. W. No. 1, Ramasami Naicken, D. W. No. 2 whose son is married to plaintiff's sister and who evidently enjoyed the confidence of the plaintiff's mother as it was in his favour that she executed power-of-attorney to demand partition from Subba Naick and who is alleged to be worth 2 or 3 lacs of rupees, defendants' 7th witness, the Village Munsif of Mallankinar who attested Exhibit III (*a*) and the will, Exhibit IV, 9th witness who is the *karnam* of Kovilangulam and has also attested Exhibit III (*a*), and many other witnesses, who are *panchayatdars*, support this case. The plaintiff's mother no doubt denies her signature. She says she does not know whether Subba Naicken went to Aruppukottai at all, and she denies that she went to Mallankinar herself. This is directly contradicted by the statement of Subba Naicken made before his death when he had no motive for uttering any falsehood. See Exhibit II. The evidence of the 2nd witness is no doubt in her favour. He says that the plaintiff's mother remained in Ramanujapuram all the time and that it was he himself who took Subba Naicken and his wife and children to Mallankinar. The plaintiff's 3rd witness is the writer of Exhibit III. His evidence strongly supports the defence case so far as Exhibit III is concerned. He is a writer of documents. He says he gets 8 annas or one rupee for writing a document and at the request of one of the defence witnesses D. W. No. 8, he wrote Exhibit III in the presence of a good number of people from Mallankinar, Kovilangulam and Ramanujapuram. He says that the plaintiff's mother, her brother, Narayana Naick, were present: they had the deed written. Subba Naick signed it and the plaintiff's mother affixed her mark. Narayana Naick, plaintiff's maternal uncle, also attested it. Exhibit III (*a*) was signed by the witness only two or three days after Subba Naick's death. The next two witnesses, plaintiff's witnesses Nos. 4 and 5, are examined to show that the telegram to the Sub-Magistrate that Kuppusami Naick had removed his iron safe, was sent at the instance of Subba Naick. This is opposed to the evidence of Subba Naicken himself and does not directly bear on the genuineness of Exhibit III. The last witness, P. W. No. 6, is the brother of P. W. No. 1, who is alleged by the defence witnesses to have attested Exhibit III. He says that the signature in Exhibit III looks like his, but denies that he signed it. He was not examined before the District Registrar who commented strongly on the omission, and there is no doubt it was on that account that he has now been examined. This oral evidence of the plaintiff is not sufficient to rebut the evidence given on behalf of the defendants. The probabilities are in favour of the genuineness of Exhibit III. The plaintiff's mother had been demanding partition. Subba Naicken had stated before the Station House Officer, Exhibit II, that the bulk of the property belonged to himself and did not form family property. There is little doubt that it was in the interests of the plaintiff himself that the matter should be settled during Subba Naick's life-time in the way she wanted it herself. There is nothing, therefore, improbable in the evidence of the defendants that when Subba Naicken suggested to her the desirability of a partition she agreed to it. The Judge has believed the defence evidence and I see no reason to differ from him. I, therefore, hold that Exhibit III is genuine.

It is next argued that the plaintiff's mother was not justified in consenting to a division of properties on that date. It is not denied that under ordinary circumstances she would be entitled on behalf of her minor son to enter into an agreement of partition. If a partition cannot take place among the members of a Hindu family when there is a minor,

then a partition would, in many cases, be impossible. In this family there can be no doubt that his mother was his proper representative. But it is said that Subba Naicken died within a few days after the partition and that she must have known of his impending death, and, therefore, she was wrong in consenting to this partition, which had the effect of defeating the right of the minor to take by survivorship the entire property of Subba Naick who has no sons. I am not able to accept this contention. The law will not recognise the contingency or probability of a person's death as a reason for not consenting to a demand for partition which a person is entitled to claim.

It was argued before us that as she was not entitled to give her assent to the partition, a declaration by Subba Naick alone of severance of interest would not be of any avail. This question does not arise, as I have found that the minor's mother was a consenting party to the partition. But as the question is fully argued and I do not feel any doubt on the question I proceed to give my opinion.

I think the question is really concluded by the decision of the Judicial Committee in *Suraj Narain* v. *Iqbal Narain* (1). Their Lordships say in that case that a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation, but to have that effect the intention must be unequivocal and clearly expressed. In my opinion it clearly means that it is open to a member of an undivided family governed by the *Mitakshara* Law to effect a separation between himself and the other members of the family by a declaration to that effect made to the other members. Of course, the declaration must be clear and in such a form that it is not open to him afterwards to say that he still continues to be a member. It is said that their Lordships must not be taken to have decided this question as their statement of law itself is not clear and it is opposed to their own prior decisions and to the accepted principles of the Hindu Law of co-parcenary. Before that decision in a series of cases, *Bulakee Lal* v. *Mussamat Indurputtee Kowar* (2), *Mussamat Vato Koer* v. *Rowshun Singh* (3), *Ram Dhyan Koonwar* v. *Musammat Phoolbas Kooer* (4), *Raghubanund Doss* v. *Sadhu Churn Doss* (5), *Radha Churn Doss* v. *Kripa Sindhu Doss* (6), the Calcutta High Court had taken this view. The Madras High Court in *Sudarsanam Maistri* v. *Narasimhalu Maistri* (7) and in *Thandayuthapani Kangiar* v. *Raghunantha Kangiar* (8) had taken the contrary view. Both these views were placed before their Lordships. The opinion of one at least of the commentators of Hindu Law is clear on the point. In Vyavahara Mayuka—Mandlik on Hindu Law, page 38—it is said that "even where there is a total absence of any property, a partition is effected by the mere declaration, 'I am separate from thee.' For partition is a particular condition of the mind and this declaration is indicative of the same." In these circumstances I cannot disregard the expression of opinion by their Lordships of the Privy Council. I am, therefore, of opinion that this contention cannot be allowed. The next question that is argued before us is that Exhibit III requires registration and is, therefore, not admissible in evidence to prove even a division in status. This objection was not raised in the lower Courts. Subba Naick's widow, Seethammal, presented the document for registration and on the Sub-Registrar's refusal she appealed to the District Registrar before whom the plaintiff contended that the document should not be registered. After hearing both sides the District Registrar refused her application on the ground that neither Exhibit III nor Exhibit III (*a*) can be registered, though he found that Exhibit III was genuine. She then filed a suit for an order to direct registration, the plaintiff contested the suit. It was decided in appeal by the High Court that she was not entitled to present the document for registration or to get it registered. It would be unjust to allow the plaintiff now, after defeating all her attempts to get her documents registered both before the Registration officers and before the Civil Courts, to contend that for want of

(1) (1913) 35 All. 60 = 18 I. C. 30 = 40 I. A. 40 = 16 O. C. 129 (P.C.).
(2) (1865) 3 W. R. 41.
(3) (1867) 8 W. R. 82.
(4) (1870) 14 W. R. 340.
(5) (1879) 4 Cal. 425.
(6) (1880) 5 Cal. 474.
(7) (1902) 25 Mad. 149.
(8) (1912) 35 Mad. 239; 10 I. C. 660.

registration the document is invalid. The decision that she could not get the document registered is binding on him and he is estopped from raising the plea. Moreover the Registrar has dicided that Exhibit III cannot be registered under the provisions of the Registration Act. Assuming that decision is not binding on the parties, it is not shown to be wrong and that the document could be registered. In that case the objection is not of any force. It was while the litigation was pending that the present suit was filed and I have no doubt that the objection was not raised in the lower Court, because it was then thought that the question of registration would depend upon the result of that decision. For these reasons I am of opinion that the appellant should not be allowed to raise this question in appeal. But as my learned brother disagrees with me, I proceed to give my opinion on the main question whether a will effecting a division in status requires registration.

For the decision of this question a division in status may be taken to be a severance of co-parcenary between some or all of the members of an undivided family, although the property is unapportioned and left in joint enjoyment as before. The act may be unilateral as we have already decided. A definite and unambiguous declaration by a member is sufficient to constitute him a divided member though this, in my opinion, makes no difference in principle. The only changes effected by a division in status are that the share is fixed without liability to increase or diminution by deaths or births and that on the death of a member without sons, his share so fixed devolves on his widow or the other heirs who take according to the rule of Hindu Law of succession in the absence of sons. A document declaring such division in status may be taken for this purpose to have no reference to property at all. It effects only a change in status. On principle such a document does not require registration, as a person's power of dealing with any specific property is not affected thereby.

It is argued that the joint tenancy has been converted into tenancy-in-common. The differences between the joint tenancy of a Hindu family and as it is understood in English Law must be borne in mind. In the former the joint tenancy has its origin in birth and not by conveyance. There is no unity of possession, the managing member being alone entitled to it against the others. There is no unity of title, as the members do not derive their interest at the same time. There is no unity of time, as they do not hold for the same time and from the same time. There is no unity of interest, as some may be entitled to larger shares than others. The chief characteristic of survivorship does not exist, as a co-parcener's interest devolves not on all the others but only on his sons if any. A co-parcener's interest is again liable to diminution unlike the interest of a joint tenant in English Law. The notion that a document effecting a severance in status requires registration is due apparently to the notion derived from English Law that the member thereby takes a specific part of the whole as his exclusive property. But a division in status only fixes the share without liability to fluctuation and introduces a new rule of devolution of property in the absence of sons. The rights of the co-sharers are not otherwise varied. The entire property remains common stock, the co-sharers continue interested in every part of it. Whatever increment is made to the common stock becomes part of it as before severance, no matter by whose exertions it may have been made. The expressive words of Apararka that partition does not create any new right but has only the effect of rendering visible the right already existing, applies strictly to this kind of partition. I am of opinion that a document merely creating a separation in status does not fall within the provisions of the Registration Act requiring registration. It does not in itself create any interest and if any is created it is by operation of rules of Hindu Law, not by virtue of the instrument.

Exhibit III itself does not in terms divide any specific property. Neither Subba Naick nor the plaintiff derives any title to any specific property under it. It is only documents which on their face show that they come within the terms of the sections of the Registration Act that require registration. *Cf. Jiwan Ali Beg* v. *Basa Mal* (9). This is also

(9) (1887) 9 All. 108 (F. B.).

the view taken by this High Court. Mere possibility or probability is not enough. For the same reason if it is a custom or a rule of Hindu Law that in conjunction with the deed operates to create a title to immovable property, registration is not compulsory. Grant of waste lands or *dharkhast* in *zemindaris* and certain estate carries with it according to custom a right of occupancy. But if the document itself does not confer the right no registration is necessary. *Ramaswamy Iyer* v. *Thirupathi Naick* (10). Similarly a deed of adoption does not require registration, though adoption confers on the adopted son an interest in the immovable property of the family of the adoptive father. Reliance is placed on *Lakshmamma* v. *Kameswara* (11). In that case, it was decided that an unregistered partition-deed cannot be received in evidence to effect even the movable property referred to therein. It proceeds on the view that the partition therein effected was an indivisible transaction and if therefore it cannot be received to affect immovable property, it cannot be received to affect movable property either. Here the question is not whether the transaction is one and indivisible. A transaction effecting a division in status is very different from one effecting a division of properties. Further the authority of *Lakshmamma* v. *Kameswara* (11) is greatly shaken by the decision of *Thandavan* v. *Valliamma* (12), in which it was laid down that a document which is inadmissible to effect a transaction, in so far as it affects immovable property, may be received in evidence so far as the other properties are concerned. See also *Narayanan Chetty* v. *Muthiah Servai* (13). In *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (14) it is distinctly stated that the unregistered document there in question was not produced to prove any collateral transaction. The cases deciding that a lease or a sale cannot be received in evidence in order to prove the nature of the possession of the party who held under that document, have no application. They proceed on the principle that as the possession of the land in such cases can only be proved by proof of the transaction directly and in terms affecting immovable property, the documents are not thereby admissible. I, therefore, disallow this contention.

But as my learned brother disagrees with me, the appeal is dismissed with costs under S. 98 (2), Civil Procedure Code.

Oldfield, J.—I have had the advantage of reading my learned brother's judgment and I can add nothing in support of his finding, in which I concur, as to the execution of Exhibit III and the validity of, and necessity for, the plaintiff's mother's consent to the partition. I regret that I differ from his conclusion that the partition can be established as regards the immovable property in suit notwithstanding that Exhibit III is unregistered.

The facts are that the deceased Subba Naick could dispose of his property by will in 2nd defendant's favour, only if he possessed a separate interest in it, that is, if he was at the date of his death divided in estate from the plaintiff, his minor nephew. Exhibit III is alleged to have effected such a division. Its terms include statements that "the cash, movables and immovables, Court decrees, etc., of which these two coparceners are possessed, valued at Rs. 80,000," have been divided into equal moieties, that their connection shall hereafter be only by relationship and that they will get the *pattas* relating to the lands allotted to their respective shares transferred to their names separately. There is no further specification of the properties dealt with or which fell to each share. Such specification is wanting also in the will, Exhibit IV, and is given only in the lists, Exhibit III (*a*). But they are useless because, we agree with the lower Court, they were not part of Exhibit III and were not executed by or part of the act of the deceased.

The objection that Exhibit III is unregistered was first taken in this Court; and the arguments for and against it have mainly followed those relied on by Sadasiva Aiyar, J., on the one side in *Ayyakutti Mankondan* v. *Periasami Koundan* (15) and on the other by Spencer, J., in that case and my learned

(10) (1904) 27 Mad. 43.
(11) (1890) 13 Mad. 281.
(12) (1892) 15 Mad. 336.
(13) (1912) 35 Mad. 63=8 I. C. 520.
(14) (1910) 6 I. C. 346.
(15) A. I. R 1914 Mad. 121=24. I. C. 771.

brother, Sankaran Nair, J., in *Subramania Aiyar* v. *Savitri Ammal* (16). I am unable to regard the question as concluded by the authority of the latter decision because I understand Pinhey, J., who also took part in it, to have proceeded, not only on the unregistered documents then in question, but also on the other evidence that a partition had occurred and on the defendants' admissions and to have dissented as regards some items, in respect of which such evidence or admissions were not available.

An attempt has indeed been made in the present case to support the partition by reference not merely to Exhibit III, but also to the parties' conduct. It is, however, unnecessary to decide whether a decision could be founded on the evidence of the latter with or without reference to the former, because in fact no such evidence has been referred to. The deceased died on the day after the execution of Exhibit III; and though there is nothing definite as to the entry of the defendants on the immovable properties, there is nothing to show that those in charge of the plaintiff's interests acquiesced in their possession, the evidence being that they contested their right without delay in registration and guardianship proceedings. The defendants, therefore, must succeed, if at all, with direct reference to Exhibit III alone.

Exhibit III, alone and unregistered, effected, I concede, a division in status and might perhaps have entitled the defendants to claim a division of the movables. But as regards immovables the greatest direct effect that can be claimed for it is that it converted the joint holding into one in common. That is, it gave each member of the family a vested title to his share, as it then existed, instead of a right merely contingent on his surviving till a partition might take place.

It is not, in my opinion, possible to hold that this change did not extinguish one kind of right in the property and create another within the meaning of S. 17 of the Registration Act and affect it within the meaning of S. 48. For I see no escape from the dilemma that Exhibit III either does affect the property and should be registered or does not affect it and cannot support a claim to it.

The alternative view, supported by my learned brother in *Subramania Aiyar* v. *Savitri Ammal* (16), is that "it is not the written instrument, which makes the alteration" in the nature of the tenancy, because, "when by virtue of it the members of the family become divided in interest, then the rule of the Hindu Law converts their relation into one similar to a tenancy-in-common." But with all due deference I cannot follow him. For it does not seem to me possible to treat the rule of law as operating independently of the instrument, when it is the clear effect of the one to invoke the operation of the other. The reference to a rule of law can mean only that the meaning of the document is determined with regard to it by necessary implication; and there is still no reason why such determination should be recognised, as conferring substantive rights, and neglected, when the necessity for registration is considered.

We have been pressed with two alleged instances of titles to immovable property, originating in unregistered documents, but alleged to be completed by operation of law. Deeds of adoption, no doubt, do not require registration. But it is doubtful whether even in the case of *Sudras* the adoption and creation of rights under it are not effected by the giving and taking of the son and not by the deed which merely evidences it: *Mahashoya Shosinath* v. *Siramati Krishna Soondari Dasi* (17); and in any case an adoption must be regarded as equivalent to the birth of a son, whose right may, therefore, be considered as arising by operation of law. The authority as to leases is *Ramaswamy Iyer* v. *Thirupathi Naik* (10) and it decides only that when they are operative to transfer possession as they stated and only the right to possession is in question, you are not to read into them an additional term in order to attract the provisions of the Registration Act, not that they are any other document, relied on as operative on property, is exempt from registration, because such operation is merely implicit.

It is observed in *Subramania Aiyar* v. *Savitri Ammal* (16) with regard to the general policy of the Act that with

(16) (1909) 3 I. C. 321.

(17) (1881) 6 Cal. 381=7 I. A. 250 (P. C.).

reference to the object of Ss. 17 and 48, the protection of intruding alienees, it can make little difference in the investigating of title whether the property is being held by a Hindu joint family as joint tenants or tenants-in-common. But it is clear that the alienee of a share takes it as it stood on the date of his transfer and that he may be prejudiced if the fact that it has been ascertained already, possibly before the death of some co-parcener, which he would naturally assume has increased it, is withheld from his knowledge.

Lastly with reference to the policy of Ss. 21 and 32 in particular and the facts that Exhibit III could not have been registered, because (1) it did not contain the detailed description of the property required by the former and (2) was not, as this Court had held, presented for registration by a competent person in conformity with the latter. As regards (1) the argument adopted by Spencer, J., in *Ayyakutti Mankondan* v. *Periasami Koundan* (15) is relied on as entailing that a document, which cannot be registered with reference to immovable preperty for defects in the description, must on that account be treated as operative with reference to it and for other purposes. With great respect this seems to me to confuse an objection to registration on formal grounds with the argument on a distinct point, the necessity for registration with reference to the subject-matter of the document, and to involve the anomaly that, whilst a document may be operative in spite of the omission of all the particulars, which S. 21 requires, it might be refused registration and be useless on account of the absence of one only. And as regards (2), the presentation by an incompetent person, the suggestion that the plaintiff's successful opposition to the registration on that account debars him from objecting here to the document as unregistered seems to me unsustainable. For there is no inconsistency between his contentions that Exhibit III should have been registered and that no one concerned to register it did so; and the defendants' argument amounts to no more than this, that the document should be admitted because two objections to it, instead of one, are available. It may be matter for regret in the circumstances of the case that defendants' expectations have been disappointed and the deceased's intention rendered abortive. But that is the result of the latter's postponement of his dispositions, until he had no time to make them in a legal way; and the fact that he chose to risk postponement cannot entitle the Court to dispense with the requirements of the law for the advantage of his beneficiaries.

The question of registration was first raised in this Court. It is possible that the disposition of movables contained in Exhibit III may be separable from that of immovables and the document may be operative as regards the former. But as my learned brother's decision prevails, I do not consider further whether the defendants are entitled to an inquiry on this point. I would in any case allow the appeal, as regards the immovable properties, but without costs. In the circumstances the appeal is dismissed with costs.

S.N./R. K.

Appeal dismissed.

A. I. R. 1916 Madras 567

KUMARASAWMI SASTRI, J.

Chanda—Petitioner.

v.

Rama Misari—Counter-Petitioner—Respondent.

Criminal Revn. Case No. 378 of 1914, and Criminal Revn. Petn. No. 310 of 1914, decided on 28th October, 1914, from the order of Sub-Divl. 1st Class Magte., Ramnad, in Misc. Case No. 11 of 1914, dated 30th May, 1914.

Criminal P. C. (5 of 1898), S. 488—Existence of relatives capable of maintaining is no ground to refuse maintenance.

A wife's application for maintenance against her husband should not be dismissed on the mere ground that she has relations or friends willing to maintain her or to bear the costs of the proceedings. 2 Weir 616, Cr. foll.

[P. 568, C. 1.]

T. Rangachariar—for Petitioner.

C. Padmanabha Aiyangar—for Respondent.

Order.—The Joint Magistrate does not find that the petitioner was not the wife of the counter-petitioner. He stopped the case after three witnesses were examined. He does not find that the petitioner had sufficient means independent of the

husband. The mere fact that she has relations or friends willing to maintain her or to bear the costs of the proceedings will be no ground for dismissing the application, *Kunnath Anjumma* v. *Veluth Ahmed* (1).

I am of opinion that the order of the Magistrate cannot be supported. I set it aside and direct him to proceed with the inquiry and dispose of it according to law.

S. N./R. K.

Order set aside.

(1) (1890) 2 Weir 616, Cr.

A. I. R. 1916 Madras 568

AYLING AND TYABJI, JJ.

Kalayi Narayana Jogithaya—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

Second Appeal No. 332 of 1914, decided on 16th February, 1915, against the decree of Dist. Judge, South Canara, in A. S. Suits Nos. 507 and 517 of 1911.

Evidence Act (1 of 1872), S. 35—Entries in survey register can prove extent of encroachments but not title.

Entries of the extents of the survey fields made in survey registers are admissible under S. 35 to prove an encroachment, though insufficient to prove title to the extent encroached upon. 10 I. C 653; 33 Mad. 173 and 33 Mad. 362, dist. [P. 568, C. 1.]

B. Sitarama Rao—for Appellant.

Government Pleader—for Respondent.

Judgment.—The District Judge has found, as a fact, that the plaint plots are encroachments on *poramboke*. The appellant's Vakil seeks to attack this finding on the ground that it is based on evidence which is legally insufficient, *i.e.*, on the entries and measurements in the survey records. It is not denied that this is relevant evidence under S. 35 of the Indian Evidence Act and it has in many cases been relied on as valuable [Vide *Sankaran Nambudripad* v. *Manavikraman* (1)]. The appellant relies on the dicta in *Krishna Aiyar* v. *Secretary of State for India in Council* (2). and *Venkatarama Aiyar* v. *Secretary of State for India in Council* (3). "This (classification of the items as *nattam poramboke*) at the utmost was an assertion of title, and is not by itself sufficient to prove the title of the defendant:" *Krishna Aiyar* v. *Secretary of State for India in Council* (2). "Such entry (of a disputed tank in *pymash* and settlement registers as Government *poramboke*) is, of course, insufficient to prove that the tank is, in fact, the property of Government:" *Venkatarama Aiyar* v. *Secretary of State for India in Council* (3). We doubt whether the learned Judges in either case meant to lay down a rule of law as to the quantum of evidence requisite to prove a question of fact. But apart from this the cases are quite distinguishable.

In each reported case the learned Judges were considering to what extent the description of a particular piece of land or a tank in a Government register as *poramboke* should be accepted as proof that the land or tank was really *poramboke*. Here the question is different. It is not disputed that a "*todu*" has been in existence from time immemorial and is government *poramboke*. The question is how far it extends: and in determining this the District Judge has relied on the records of and measurements taken by the Survey Department in the course of their ordinary official duties as evidence of the extent of the *poramboke* at the time of the survey. This he is entitled to do: and it is not within our province, sitting as Judges in second appeal, to determine whether it should be accepted as sufficient, or what weight on the other side should be given to the appearance of the ground at the time of suit or the existence of trees relied on by the appellant.

The second appeal must be dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) (1911) 10 I. C. 653.
(2) (1910) 33 Mad. 173=5 I. C. 121.
(3) (1910) 33 Mad. 362=5 I. C. 118.

A. I. R. 1916 Madras 569

AYLING AND SESHAGIRI AIYAR, JJ.

K. E. P. T. V. Draviyam Pillai and *another*—Plaintiffs—Appellants.

v.

Cruz Fernandez and *another*—Defendants—Respondents.

Second Appeal No. 731 of 1913, decided on 22nd September, 1915, from the decree of Dist. Judge, Tinnevelly, in Appl. Suit No. 181 of 1912.

Madras District Municipalities Act (4 of 1884), S. 250 (1) (a)—Test of determining liability of chairman for not properly recording name of voter is whether he acted in good faith—It includes deligence and care—Chairman held responsible for not including name of representative of firm, or not determining name of representative.

The plaintiff firm applied to the Chariman of the Municipal Committee that the name of its representative be registered as a voter. The application was rejected and the firm's representative was not allowed to vote at the election. The plaintiff sued for damages:

Held, (1) that the real test to determine whether the Chairman was liable or not on the ground that the name of the firm was not clearly described in the register of voters, was whether he when he passed the order was acting "in good faith" which implied "due care and diligence;" [P. 570, C. 1.]

(2) that inasmuch as the Chairman was himself responsible for the ambiguous entry in the register, it was his duty to hold an enquiry if he entertained any doubt as to the identity of the firm's representative; [P. 570, C. 2.]

(3) that since he had rejected the plaintiffs' application without good cause he was liable in damages. 31 Bom. 37; and 24 Cal. 107. foll, [P. 570, C. 2.]

T. R. Ramachandra Aiyar, *V. S. Govindachariar* and *V. S. Kallabhiram Aiyangar* for Appellants.

J. L. Rosario, *K. V. Krishnaswami Aiyar* and *C. Krishnamachariar*—for Respondents.

Judgment.—The facts of this case are very simple. Plaintiffs are the firm of K. E. P. T. V. Draviyam Pillai and Venkatachellam Pillai. They are registered in the voting register of the Tuticorin Municipality as "K. E. P. T. V. Draviyam Pillai and another," Note (1) to R. 4 of the rules promulgated by Government under S. 250 (1) (*a*) of the District Municipalities Act provides that a firm desirous of voting, "when entitled to be registered, must cause the name of a partner, member, agent or secretary to be entered in the register maintained under R. 3 *supra* as their representative, and he alone shall be entitled to vote on behalf of the Company or family." This rule has been interpreted in G. O. No. 2020 M, dated 27th September, 1905, as follows:—"It is the duty of the Chairman to see that proper representatives for purposes of voting are registered by the Companies, Associations and undivided families entitled to such privileges and brought on the register of voters at the time of its preparation.

"2. There is, however, no objection to the registration of the representatives of these bodies or to modifications of such registration under the Note 1 to R. 4 at any time during the year. The nomination of a representative does not necessarily constitute an amendment of the register of voters, but is merely by way of subsidiary instruction which is essential to make the accepted list effective."

A Municipal election was held in Tuticorin on 6th October, 1910. On the previous day the following petition was presented to the Chairman (1st defendant) (Exhibit N):

"The petition written by K. E. P. T. V. Draviyam Pillai and Venkatachellam Pillai of the said place is as follows:—

"We request that Venkatachellam Pillai of us would be accepted as a representative of us two and that his name be registered in the voters' register of the 5th ward."

The following order was passed on this by the 1st defendant apparently early on the following day (6th October, 1910).

"Rejected.....The names of both the persons mentioned in this, do not appear in the voter's list."

When Venkatachellam Pillai presented himself on that day at the polling booth, 2nd defendant who was the identifying officer referred him to this order and refused to allow him to vote. He, therefore, did not vote. The firm now sue for Rs. 1,000 damages.

That the order of the 1st defendant on Exhibit N was not justifiable is admitted by the District Judge. He says:

"There can, I think, be no doubt that under the rules, 1st defendant had power

to allow Venkatachellam Pillai to vote as the firm's representative. The description in the list, however ambiguous, could have been modified by him and no reason is shown why he did not modify it and allow Venkatachellam Pillai's vote. I must, therefore, hold that he exercised his discretion wrongly in disallowing the vote." He has, however, dismissed the suit, holding on the supposed authority of *Chunilal Maneklal* v. *Kirpashankar* (1) that *malice*, meaning presumably "express malice", is necessary to sustain the action and that such malice is not proved.

In our opinion the word "malice" which occurs in the penultimate sentence of the reported judgment in that case, means nothing more than a lack of *bona fides*. The learned Judges merely lay down that an officer in a position of this kind "is not liable to a suit because he made a mistake *in good faith* in determining questions that arose for his decision." [*Vide* also *Sabhapat Singh* v. *Abdul Gaffur* (2)]. The real test is whether 1st defendant when he passed his order was acting "in good faith", which implies "due care and diligence."

Viewed from this standpoint, we find it impossible to exonerate the 1st defendant. The grounds on which he seeks to justify his action are these, as set out in paragraph 6 of his written statement: "Under these circumstances, as in the suit petition which was received by defendant on 6th October, 1910, it was requested that the name of Venkatachellam Pillai, an individual not found in the said list, may, be newly entered therein as the representative of two persons named in the petition, and as in the said petition the name of the particular firm of which that individual was required to be registered as the representative was not clearly described, and as it was not clear that the voter numbered as 136 was the said identical firm under the name K. E. P. T. V. or if it referred to the two individuals named in the suit petition and as an objection petition had been received in connection with vote No. 136, the defendant reasonably surmised that he had no authority to grant an order in compliance with the petition and in accordance with law and *mamool*, and to the best of his discretion rightly and with *bona fide* intentions, the defendant came to be of opinion that it could not be registered as requested in the petition and in pursuance of this opinion, the endorsement on the suit petition was made."

Now as regards this, it may be observed (1) that the 1st defendant, as Chairman, was himself responsible for the ambiguous entry of "Draviyam Pillai and another" in the voting register, (2) that if he entertained any doubt of the identity of Venkatachellam Pillai with the person entered as 'another' it was easy and his plain duty to hold an enquiry, (3) that in a precisely similar case a firm was allowed to record a vote by a representative, although the names of all the partners were not specified in the voting register (*vide* paragraph 16 of the District Munsif's judgment), and (4) that the mere presentation of an objection petition by someone else could not possibly be an excuse for denying to plaintiffs their right of voting or, at any rate, for refusing to enquire into whether they did possess such a right. His learned Vakil has suggested that the G. O. above referred to has no legal effect and that it is doubtful if the Chairman has power to enter the name of the representative in the register except at the time of its preparation or revision. We see no reason to put a different interpretation on the rule than that set forth in the G. O. But, however this may be, the 1st defendant never pleaded that his action was in any way influenced by doubts on this score, and this argument cannot be considered in judging of his good faith. In our opinion, the 1st defendant was not acting in good faith in rejecting the petition, Exhibit N, and he is liable for damages. We see no reason to call for a finding from the lower Appellate Court as to the amount, as there is no basis for assessment; and we agree with the District Munsif that the plaintiffs are only entitled to nominal damages.

The decrees of the lower Courts will be set aside and the plaintiffs will be given a decree for Rs. 50 damages and full costs throughout against the 1st defendant only. Plaintiffs seek for no remedy in this Court against the 2nd defendant,

(1) (1907) 31 Bom. 37.
(2) (1897) 24 Cal. 107.

who is exonerated; but we make no order as to his costs.

S.N./R.K.

Suit decreed; Appeal allowed.

A. I. R. 1916 Madras 571

SPENCER AND SESHAGIRI AIYAR, JJ.

In re Mala Mekalakati Subbadu — Petitioner—Accused.

Criminal Revn. Case No. 774 of 1914, Criminal Revn. Petn. No. 646 of 1914, Criminal Revn. Case No. 72 of 1915, (Taken up No. 9 of 1915), decided on 1st February, 1915, from the order of the Deputy Magte., Cuddapah, in Crl. Appl. No. 32 of 1914.

(a and b) Criminal P. C. (5 of 1898), Ss. 233, and 239—Joinder of several accused for separate offences is not permitted.

S. 239, Criminal Procedure Code, does not permit the joint trial of accused for different offences committed in the course of different transactions. [P. 572, C. 1.]

Where, in respect of offences of house-breaking and theft committed in two different villages on two distinct nights, the 1st accused was charged with the offences under Ss. 457 and 380, Indian Penal Code, and the second accused with those under Ss. 457 and 380 or 411, Indian Penal Code, and both the accused were tried at one trial in respect of the above charges;

Held, that the trial was bad. 33 Cal. 292 and 29 Bom. 449, Foll. [P. 571, C. 2 & P. 572, C. 1.]

(c) Criminal P. C. (5 of 1898), S 222—Articles, owner, place and subject of theft not specified—Held charge was bad.

Where the charge did not specify the articles stolen or the name of the person whose house was broken into and the place of offence was given only as one village whereas the trial was for offences committed at that village as well as another; *Held*, that the charge was bad for vagueness. [P. 572, C. 1.]

(d) Criminal P. C. (5 of 1898), S. 537—(Per Seshagiri Aiyar, J.)—S. 537 cannot cure wil ul disregard of statute.

Per *Seshagiri Aiyar, J.*—Disregard of a plain duty cast by law on a Magistrate cannot be condoned with reference to S. 537, Criminal Procedure Code. [P. 572, C. 2.]

(e) Criminal P. C. (5 of 1898), S. 233—S. 233 is mandatory and must be strictly applied.

S. 233, Criminal Procedure Code, must be strictly applied save where the Code itself provides exceptions. 25 Mad. 61 (P. C.); A. I. R. 1915 Cal. 296; 30 All. 351; 29 Cal. 385 and A. I. R. 1914 Cal. 288, Ref. to. [P. 572, C. 2.]

Koti Reddi for *K. Subba Reddi*—for Petitioner.

P. R. Grant for *Public Prosecutor*—for the Government.

Facts.—There was a house-breaking and theft committed on a certain night in the village of Tadigotla, and on the next night a similar offence was committed in the village of Nallapu Reddi Palli, about four miles distant from the former. The stolen property was recovered two days after the second theft. The accused (the 2nd being the concubine of the first) were charged, before the Stationary 2nd Class Magistrate of Cuddapah, the first with offences under Ss. 457 and 380, Indian Penal Code, and the second with offences under Ss. 457 and 380 or 411, Indian Penal Code. The charge did not specify either the articles stolen or the owner of the houses broken into and the name of only one village was mentioned in the charge, while the trial was for offences committed in two villages. The Sub-Magistrate convicted the accused of the offences charged. On appeal the Deputy Magistrate of Cuddapah confirmed the conviction, holding that though the joint trial and joint charge were bad, that was only an irregularity which was cured by S. 537, Criminal Procedure Code, as the same was not shown to have prejudiced the accused in any way. The 1st accused thereupon preferred this criminal revision petition to the High Court, which took up *suo motu* the case of the 2nd accused.

Order.

Spencer, J.—It is contended that in this case there has been a misjoinder of charges and I find the contention to be sound.

It appears that house-breaking and theft occurred in two villages four miles apart on two successive nights. The 1st accused was charged with house-breaking and theft and the 2nd accused, his concubine, was charged with house-breaking by night and theft or in the alternative, with receiving stolen property.

Seeing that no witnesses came forward to say that they had seen the thieves in the act of committing the offences of house-breaking and theft, it is not clear why the male prisoner was not also charged in the alternative under Ss. 457 and 380 or S. 411 of the Indian Penal Code, but perhaps the Magistrate may have considered that the female prisoner was less likely to have taken an active part in the theft and house-breaking.

Be this as it may, there is nothing to suggest that the house-breaking and theft at Nallapu Reddi Palli was part of the same transaction at the house-breaking and theft at Tadigotla, and we must, therefore, take it that they were two separate transactions.

Now as pointed out in *Budhai Sheikh* v. *Emperor* (1), which had been followed by decisions of this Court, S. 239, Criminal Procedure Code, is the section of the Code which deals with the trial of more persons than one and it permits them to be tried jointly for the same offence or for different offences committed in the course of the same transaction, but not for different offences committed in the course of different transactions.

In the present case prosecution witnesses Nos. 1 and 2 identified a cloth (material object No. 1) as one that had been stolen from the house of prosecution witness No. 1 at Tadigotla and prosecution witness No. 3 identified a jewel (material object No. 2) as one that had been stolen from his house at Nallapu Reddi Palli. The two accused were tried for different offences in respect of these two articles stolen on different occasions, a procedure which tended to cause complication, besides being unwarranted by law.

The charge is also bad for vagueness, as it does not specify the articles stolen or the name of the person whose house was broken into, and the place of offence is given only as Tadigotla, whereas the trial was for offences committed both at Tadigotla and at Nallapu Reddi Palli.

We accordingly set aside the convictions and sentences and direct that the accused be re-tried on charges properly framed by such Magistrate as the District Magistrate of Cuddapah may direct, other than the Magistrate who has already tried the case.

Seshagiri Aiyar, J.—I entirely agree. The alleged thefts were on two different dates in two different villages. The stolen property was recovered two days after the second theft. The Public Prosecutor has not argued that these three incidents relate to the same transaction. Under S. 233, there should be separate charges and separate trials, unless any of the exceptions contained in Ss. 234 to 239 apply. The Appellate Magistrate, while conceding that the joint trial and joint charge were irregular, has held that as the irregularity has not been shown to have prejudiced the accused, the proceedings need not be set aside. It was pointed out in *Subramania Ayyar* v. *King-Emperor* (2) that "disobedience to an express provision as to a mode of trial" was not a mere irregularity. Following this dictum, the learned Judge of the Calcutta High Court in *Raman Behary Das* v. *Emperor* (3) held that S. 233 must be strictly applied save where the Code itself provides exceptions. The language of the section is imperative, and I am unable to agree with the Court below that the disregard of a plain duty cast by law on the Magistrate can be condoned with reference to S. 537. See *Emperor* v. *Mata Prasad* (4) and *Gobind Koeri* v. *Emperor* (5).

I have already stated that the joinder of the charge of theft with that of receiving stolen property, not in the alternative, but cumulatively is not countenanced by the Code. It may be argued on the analogy of the decision in *Musai Singh* v. *Emperor* (6) that this defect can be cured as the irregularity related only to the failure to frame distinct charges. It is also doubtful whether the two offences may not be said to arise out of the same transaction. See, however, *Mohendro Nath Das Gupta* v. *Emperor* (7). But there can be no doubt that the trial of the 1st accused with the second accused, who was only charged with an offence under S. 411 of the Penal Code, is illegal. S. 239, which permits of a joint trial of more than one accused, does not cover this case. See *Emperor* v. *Jethalal Harlochand* (8).

I agree in the order proposed by my learned colleague.

Conviction set aside; Re-trial ordered.

(1) (1906) 33 Cal. 292.

(2) (1902) 25 Mad. 61=28 I. C. 257 (P. C.).
(3) A. I. R. 1915 Cal. 296=22 I. C. 729=41 Cal. 722.
(4) (1908) 30 All. 351.
(5) (1902) 29 Cal. 385.
(6) A. I. R. 1914 Cal. 288; 22 I. C. 1008=41 Cal. 66.
(7) 29 Cal. 387.
(8) (1905) 29 Bom. 449.

A. I. R. 1916 Madras 573 (1)

SADASIVA AIYAR, J.

Muthukaruppan Servai and *another*—Petitioners.

v.

Vellayya Kudumban—Accused.

Criminal Revn. No. 137 of 1914, and Criminal Revn. Petn. No. 118 of 1914, decided on 18th September, 1914, from the Judgment of Sub-Divl. Magte., Melur, in Calendar Appl. No. 50 of 1913.

Criminal P. C. (5 of 1898), S. 428—Remand for fresh finding cannot be ordered.

S 428 of the Criminal Procedure Code does not empower an Appellate Magistrate to call for a fresh finding from a Subordinate Magistrate, nor can he act upon such finding if submitted by the Sub-Magistrate. [P. 573, C. 1.]

E. R. Osborne—for Petitioners.

C. Madavan Nair—for Accused.

N. Grant—for Government.

Judgment.—The Appellate Magistrate has fallen into three errors in his proceedings in the trial of the appeal.

One of the errors is that he seems to have asked the 2nd Class Magistrate not only to take further evidence but also to record a clear finding on the question whether the lane is a public or a private one. S. 428, Criminal Procedure Code, does not empower the Appellate Magistrate to call for a fresh finding from the Subordinate Magistrate.

The next error is that the Appellate Magistrate instead of disposig of the case himself, after considering the whole evidence including the additional evidence has purported to act upon the fresh finding of the Sub-Magistrate.

The last error is that he mistook the nature of the finding so submitted by the Sub-Magistrate.

However the whole case is trifling and as the Public Prosecutor does not wish to have the accused put again in peril, and as this petition is evidently the outcome of private malice, I decline to interfere.

S. N./R. K.

Petition dismissed.

A. I. R. 1916 Madras 573 (2)

SESHAGIRI AIYER, J.

Sellam Iyengar—Defendant—Petitioner.

v.

PA. VU. DA. VEE Veerappa Chetti and *others*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 863 of 1913, decided on 16th July, 1915, from the decree and the judgment of Tempy., Sub-Judge, Sivaganga, in Sm. C. Suit No. 734 of 1912, dated 15th August, 1913.

Civil P. C. (5 of 1908), S. 11—Suit for execution of lease deed and for arrears of rent decided on regular side—Subsequent suit for rent only in Small Cause Court—Previous decision about rent though on regular side is binding.

In a suit for the execution of a deed of lease and for arrears of rent a Munsif raised and decided on the Regular Side an issue relating to rent. Had the suit been solely for recovery of the rent it would have been beyond the jurisdiction of the Munsif. In a subsequent suit for arrears of rent filed in the Small Cause Court:

Held, that the decision of the Munsif operated as *res judicata*, although he was not competent to entertain a suit brought to recover rent alone. [P. 574, C. 1.]

A. Srinivasa Aiyangar—for Petitioner.

K. N. Aiya Aiyar and *K. Raja Aiyar*—for Respondents.

Judgment.—The plaintiff agreed to grant a lease of a house site to the 1st defendant in July 1906. The latter sub-let portions of the site to the 2nd and 3rd defendants and directed them to pay the plaintiff Rs. 1-12-0 and 1-8-0 a month respectively. Owing to the failure of the 1st defendant to carry out the terms of the agreement, the plaintiff instituted Original Suit No. 92 of 1911 on the file of the Manamadura District Munsif for the execution of the lease-deed and for arrears of rent. Defendants Nos. 2 and 3 were impleaded as parties as they were in possession. One of the issues raised in that suit was, "which defendant is liable for what portion of the rent?" The Munsif decreed that defendants Nos. 2 and 3 in this suit, who were defendants Nos. 4 and 5 in the former suit, were liable to pay Rs. 1-12-0 and Rs. 1-8-0 respectively and passed a decree to that effect.

The present suit is solely for arrears of rent and has, therefore, been filed in the Small Cause Side of the Subordinate

Court of Sivaganga. The Subordinate Judge held that the previous decision was not *res judicata* and passed a decree jointly and severally against all the defendants for the arrears.

The 2nd defendant has filed this revision petition against that judgment. I am unable to agree with the Subordinate Judge on the question of *res judicata*. Mr. Raju Aiyar contends that as under S. 16 of the Mofussil Small Cause Courts Act, Small Cause Courts alone are competent to entertain suits for arrears of rent, the previous decision by the District Munsif of Manamadura on the Regular Side is not *res judicata*. The District Munsif was competent to adjudicate on the claim for arrears, although he was not competent to entertain a suit brought to recover arrears alone.

The competency of the Munsif to decide an issue relating to arrears is not affected by the fact that a suit instituted solely for that purpose is beyond his jurisdiction. The decision in the case of *Raja Simhadri Appa Rao* v. *Ramachandrudu* (1) is directly in point. I do not think the observation of the learned Judges in the case of *Avanasi Gounden* v. *Nachammal* (2) affects this question. The observations relating to the test of appealability, which was doubted in the latter judgment, do not question the *ratio decidendi* of the decision in *Raja Simhadri Appa Rao* v. *Ramachandrudu* (1).

In the view I have taken of the effect of the former decision, the question in this case was directly in issue in the former case and is, therefore, *res judicata*.

In modification of the decree of the Subordinate Judge, I direct that defendants Nos. 2 and 3 do pay to the plaintiff Rs. 1-12-0 and Rs. 1-8-0 a month respectively regarding the arrears claimed and that the 1st defendant be held liable for any balance that the plaintiff may be unable to recover from the two other defendants.

Each party to bear his own costs throughout.

S.N./R.K.

Petition allowed.

(1) (1904) 27 Mad. 63.
(2) (1906) 29 Mad. 195.

A. I. R. 1916 Madras 574

AYLING AND SESHAGIRI AIYAR, JJ.

P. M. A. M. Vellayan Chetty —Petitioner.

v.

Jothi Mahalinga Aiyar and *others*—Respondents.

Civil Misc. Petns. Nos. 1792 to 1795 of 1914, decided on 22nd December, 1914, against the decree of Tempy, Sub-Judge, Ramnad, in Original Suit No. 75 of 1910.

(a) Practice—Re-hearing—Party not heard and so prejudiced can alone claim re-hearing of appeal.

It is only a party who has not been heard that can claim a re-hearing on the ground that he has been prejudiced. [P. 575, C. 1.]

(b) Civil P. C. (5 of 1908), O. 22, R. 4 (3)—Appeal heard and dismissed—Legal re-presentative of respondent who died two days before not brought on record—Appellant cannot claim rehearing on that ground.

Two days before an appeal came on for hearing, one of the respondents died. Neither the appellant's Vakil nor the deceased respondent's Vakil were aware of this and the appeal was heard and dismissed. The appellant claimed a re-hearing of the appeal on the ground that it had been decided without bringing the legal representatives of the deceased respondent on the record.

Held, that the appellant had no claim to a re-hearing of the appeal as in the interest of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. 33 Mad. 167; 26 Bom. 317; 14 W. R. 337; 21 Bom. 314, dist. *Duke* v. *Davis*, (1893) 2 Q. B. 260, foll. [P. 575, C. 2.]

F. H. M. Corbett and *T. Rangaramanuja Chariar* for Petitioners.

K. V. Krishnaswami Aiyar—for Respondents.

Judgment.—IN C. M. P. No. 1792 of 1914. This is an application by the appellant for an order to re-hear the appeal under the following circumstances:—Two days before the appeal came on for hearing the 2nd respondent had died. Neither the appellant's Vakil nor the Vakil who filed a *vakalat* on behalf of the 2nd respondent was aware of this. The appeal was heard and we delivered judgment dismissing it with costs. The legal representatives of the 2nd respondent do not ask us to hear the appeal on the ground that they have been prejudiced by the disposal of the case.

The learned Advocate-General who appears for the appellant on the present occasion contends that the judgment passed without bringing the legal representatives of the deceased respondent on the record is a nullity and should be set aside. The question involved is one of considerable importance regarding practice.

We have come to the conclusion that the appellant has no claim to a re-hearing of the appeal. Under the Code of Civil Procedure, the death of one of the defendants (the same rule applies to respondents) does not abate a suit. Under O. 22, R. 4, clause (3), it is provided that if the legal representative of the deceased defendant is not brought on the record within the time limited by law, the suit shall abate as against such defendant, thereby indicating that the suit can proceed against the other parties on the record. Further if a defendant has not been served owing to the default or neglect of the plaintiff, it is open to him to elect to abandon the suit as against the unserved defendant and to proceed to trial with the suit as against the others. The law also makes provision for the legal representatives of a deceased defendant themselves applying to be brought on the record under certain circumstances. The object of these various provisions is to ensure that no party shall be prejudiced by a hearing in his absence. No rule of law has been quoted to us which enables a party who has had the benefit of a full hearing to take advantage of the absence of a party on the record. The dictum of Benson and Sankaran Nair, JJ., in *Goda Coopooramier* v. *Soondarammall* (1), is against such a contention. All the decided cases are reconcilable with the principle that it is only a party who has not been heard that can claim a re-hearing on the ground that he has been prejudiced. The reasoning in *Janardhan* v *Ramachandra* (2) may appear at first sight to point the other way. The statement that under S. 571 of the old Code the Courts are bound to hear both the parties, is not conclusive of the point. *Janardhan* v. *Ramachandra* (2), *Monee Lall* v. *Fuzul Hossein* (3) and *Ramcharya* v. *Ananthachariar* (4) are all cases in which the party prejudiced was granted a re-hearing.

The rules of practice in England on which our Code is based are to the same effect. The decision of Bowen, L. J., in *Duke* v. *Davis* (5), lends strong support to the view we have taken. The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned; and that any disposal of the case, notwithstanding the death of one of the parties, will be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

In the interest of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing.

The affidavit in this case does not say in what manner the appellant was prejudiced in the conduct of the appeal before us by the fact that the 2nd respondent was dead at the time. We must decline to re-hear the appeal. The petition will be dismissed with costs.

In C. M. P. Nos. 1793 to 1795 of 1914.

As the appellant has filed applications for bringing in the legal representatives on the record, they will be granted. The Vakil who appears for the added representatives does not wish to have the appeal re-argued.

Petition dismissed.

(1) (1910) 33 Mad. 167=3 I. C. 739.
(2) (1909) 26 Bom. 317.
(3) (1870) 14 W. R. 337.
(4) (1897) 21 Bom. 314.
(5) (1893) 2 Q. B. 260=62 L. J. Q. B. 549.

A. I. R. 1916 Madras 575

NAPIER, J.

Indoor Subbarami Reddi and *another*—Plaintiffs - Appellants.

v.

Nelatur Sundararaja Aiyangar and *others*—Defendants—Respondents.

Second Appeals Nos. 1133 and 1134 of 1914, decided on 28th September, 1915, from the decrees of Dist., Judge, Nellore, in Appl. Suits Nos. 45 and 46 of 1913.

(a) Civil P. C. (5 of 1908), O. 23, R. 1 (3)—When after withdrawal of suit against some defendant, decree is passed they can appeal if costs are ordered to be borne by them.

In a mortgage suit plaintiff withdrew his claim against some of the defendants, while it was decreed against the others. The trial Judge ordered those defendants against whom the claim had been withdrawn to bear their own costs. On appeal the District Judge ordered the plaintiff to pay the costs. In second appeal it was contended that no appeal lay against the order of the trial Judge as it was not a decree:

Held, that as a decree was passed in the case, the defendants were entitled to appeal.

[P. 576, C. 2.]

(b) Civil P. C. (5 of 1908), S. 35—Discretion in awarding costs can be interfered in appeal.

Discretion as to award of costs vested in a Court under S. 35 of the Code of Civil Procedure is not absolute, and can be interfered with by an Appellate Court if exercised wrongly and arbitrarily. *Bew* v. *Bew*, (1899) 2 Ch. 467; 2 Bom. L. R. 254; A. I. R. 1914 Mad. 418; 19 I. C. 474, foll. [P. 577, C. 1.]

(c) Madras Civil Rules of Practice, R. 279 (a) and (b)—R. 279 applies also to withdrawal of suit and no question of pleader's fees arises.

Clauses (*a*) and (*b*) of R. 279 apply equally to the word "withdrawn" as to the word "compromised" and the rule therefore, has no application to the question of Vakil's fees in cases where the plaintiff withdraws his suit.

[P. 577, C. 1.]

(d) Civil P. C (5 of 1908), O. 23, R. 1 (3)—Suit can be withdrawn at any time before judgment—If withdrawn after evidence costs should be awarded.

O. 23, R. 1, of the Code of Civil Procedure fixes no time within which the plaintiff should withdraw his suit; he may do so at any time before judgment is pronounced. But where he withdraws the suit against some of the defendants after both parties have adduced evidence on a preliminary issue, he does so only "after contest" within the meaning of R. 278 (*a*) of the Civil Rules of Practice. Even if the case is not covered by R. 278 (*a*), the Court has under O. 23, R. 1 (3), power to award against the plaintiff such costs as it thinks fit.

[P. 577, C. 2.]

(e) Civil P. C. (5 of 1908), S. 35—Separate costs can be awarded where defendants raise separate defences.

Where there are several defendants raising various defences a Court has power to award different sets of costs.

[P. 577, C. 2 & P. 578, C. 1.]

T. V. Venkatarama Aiyar—for Appellants.

S. Varadachariar—for Respondents.

Judgment.—These are two second appeals from decrees of the District Judge of Nellore ordering the plaintiffs to pay the costs of defendants Nos. 13 to 16 in a mortgage suit. The Subordinate Judge had originally ordered those defendants to bear their own costs. Four points are taken in these appeals.

The *first* is that no appeal lay against the order of the Subordinate Judge as it was not a decree. That objection has now been amplified by the learned Vakil in reply by an argument that under O. 23 of the Civil Procedure Code costs can be ordered to be paid in the circumstances of this case and that, therefore, it is not a decree. I express no opinion as to the question whether, if the suit had been entirely withdrawn against all the defendants, and no order other than that contemplated under O. 23 had been made, it would have been a decree. But as undoubtedly a decree was passed in this case, I have no hesitation in holding that these defendants could appeal against that decree.

The *next* point taken was that the costs in a case where a suit is withdrawn against any defendant are in the discretion of the Court under S. 35 of the Code just as in any other case, and alternatively, in reply, that S. 35 does not apply. Assuming that S. 35 did apply, the learned Vakil argues that the discretion is absolute provided that it is purported to be exercised, and relies on a decision of the English Court of Appeal in *Bew* v. *Bew* (1), where the learned Lords Justices say that the Appellate Court will assume the exercise of discretion unless it is satisfied that the Judge has not exercised it. He then points out that Sir Lawrence Jenkins, Chief Justice of Bombay, has adopted that view in *Parshram Bhawoo* v. *Dorabji Pestonji* (2). It is true that the learned Chief Justice does adopt those words, but the case shows that he subsequently proceeded to consider whether it was shown that the absolute discretion had been exercised properly by the learned Judge on the original side of the Court. With the greatest deference to a Judge of the eminence of the late Chief Justice of Calcutta, I am unable to see how a discretion can be absolute subject to a proviso. That case was considered by the late Chief Justice of this Court in the case of *Rao Saheb T. Namberumal Chettiar* v. *Krishnajee* (3) and reliance is placed on the language used by him where he says: "I do not want to suggest that I am not prepared to accept the proposition as laid down by Sir Lawrence Jenkins." But the proposition

(1) (1899) 2 Ch. 467=68 L. J. Ch. 657.
(2) (1900) 2 Bom. L. R. 254.
(3) A. I. R. (1914) Mad. 418=22 I. C. 919.

there referred to is not the statement that the discretion is absolute, but the statement that an Appellate Court will not interfere with the exercise of discretion unless it has proceeded on a manifestly wrong ground, etc. In my view it is not an absolute discretion. I can find nothing in the language of S. 35 specifically providing that the discretion is absolute, and I find a strong indication in sub-S. (2) to the contrary: "Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing." It is a recognised canon of construction that where a Court is directed to give its reasons, it is so directed for the purpose of assisting the Court that has to consider that decision either in appeal or revision. And I am satisfied that the same rule applies here, and that this sub-section indicates clearly that the discretion is not absolute. I entirely agree with what is stated by Sadasiva Aiyar, J., in *Vadlamaunati Bala Tripura Sundaramma* v. *Dada Sahib* (4) where in dealing with the main words of the section, and not the sub-section, he says: "I think the lower Court's discretion as to costs (which discretion, I admit, is a very large discretion not to be lightly interfered with) has been exercised almost arbitrarily in this case," and then proceeds to modify it. The second point, therefore, fails.

The *next* point is that the Vakil's fee in cases withdrawn can only be allowed under R. 279 of the Civil Rules of Practice, the words of which are: "In suits withdrawn or compromised (*a*) before any defence is put in, (*b*) before the settlement of issues but after defence is put in, etc," the argument being that the words to be found in clauses (*a*) and (*b*) do not apply to the word "withdrawn." In my view that suggestion is unarguable, as the language is perfectly clear, and everything contained in clauses (*a*) and (*b*) must apply equally to the word 'withdrawn' as to the word 'compromised'. Therefore, the rule does not apply.

It is *then* argued that if it does not come within R. 279, there is no provision for it and that R. 278 (*a*) does not apply. Rule 278 (*a*) is as follows:

"When such suits or appeals are decided on the merits after contest, etc."

(4) (1913) 19 I. C. 474.

Now the facts of this case are as follows. The defendants Nos. 13 to 16 pleaded discharge and want of notice. The Subordinate Judge very properly framed issues on those pleas and required the defendants to prove them. They called their evidence and filed a number of documents. The plaintiffs called two witnesses and filed four documents. The case on these issues was argued, and at that stage, the plaintiffs withdrew their suit. I have very grave doubt whether in those circumstances, it can be said that the suit has not been decided on the merits after contest. There is no limit to the power of a plaintiff to withdraw his suit, (*vide* O. 23). He may do so at any time until judgment is delivered. It seems to me that the rule should if necessary be given a wide construction so as to cover cases where the plaintiff, realizing that the judgment of the Court will be against him, withdraws his suit. But at the last moment the power to give costs can be supported on the words of O. 23, R. 1, sub-clause (3): "Where the plaintiff withdraws from a suit.....he shall be liable for such costs as the Court may award." I see no reason why there should be any limit to the power of the Court to fix these costs, if R. 278 (*a*) of the Civil Rules of Practice does not apply The Subordinate Judge ordered the defendants to bear their own costs. The lower Appellate Court has ordered the plaintiffs to pay the defendants' costs which have been fixed on the ordinary scale. In my opinion the lower Appellate Court had power to make this order, assuming of course that it rightly interfered with the discretion of the first Court

The *last* point of law taken is that there was no power to order two sets of costs, R. 284 of the Civil Rules of Practice providing that if several defendants who have separate interests, set up separate and distinct defences and succeed thereon, a fee for one Legal Practitioner for each of the defendants ...may be allowed irrespective of his separate interest." It is argued that they have not *succeeded* on those issues, because they could not plead that those issues are *res judicata* in another suit. I do not think it necessary to decide this point either; for I think the powers

given under O. 23, R. 1 (3), are wide enough to authorize the Court to award two sets of costs.

The sole remaining question is whether the lower Appellate Court has acted properly in interfering with the discretion of the first Court, assuming that the case is covered by S. 35. I have examined the reasons given by the first Court, and, agreeing with the lower Appellate Court, can only describe them as incomprehensible. I think the lower Appellate Court's decision to vary that order by making the plaintiffs pay these defendants' costs, was right.

The result will be that these two appeals will be dismissed with costs.

S. N./R. K.

Appeals dismissed.

A. I. R. 1916 Madras 578

WALLIS, OFFG. C. J. AND SESHAGIRI AIYAR, J.

Palaniappa Chetty and *another*—Plaintiffs—Appellants.

v.

Ramanathan Chetti and *others*—Defendants—Respondents.

First Appeal No. 130 of 1912, decided on 3rd November, 1914, against the decree of Sub-Judge, Ramnad, in Original Suit No. 329 of 1910.

(a) Mortgage—Relationship of agent and principal in collection of outstanding does show that mortgage between parties is satisfied.

The mere fact that a mortgagee acted as the agent of the mortgagors in collecting their outstandings, does not show that the mortgage-debt is discharged. [P. 578, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 53—Transfer of portion for genuine debt is not voidable.

A transfer by a debtor, for a genuine debt, of part only of his property is not voidable under S. 53 of the Transfer of Property Act. 23 Mad. 227 (P.C.) and (1902) 2 K. B. 58, foll. [P. 578, C. 2.]

K. N. Aiya—for Appellants.

K. S. Jayaram Iyer—for Respondents.

Facts. Defendants Nos. 2 to 5, members of a banking firm, were heavily indebted to the firms of the plaintiff and of the 1st defendant (who was a close relation of theirs) in respect of *adathi* transactions between them. While on the eve of bankruptcy they mortgaged a portion of their immovable properties to the 1st defendant's firm in respect of a portion of their dues. Later on, owing to the inability of the said firm to manage their affairs, the firm of the 1st defendant took up the management into its hands and collected some of its outstandings as its agent. The plaintiff firm, having obtained a decree against the firm of defendants Nos. 2 to 5, attached the properties mortgaged to the 1st defendant's firm. The latter preferred a claim and it was allowed. The present suit is for a declaration that the mortgage in favour of 1st defendant's firm was not binding on the plaintiff's firm, as being a fraud against creditors, and that further the same had been discharged. The Subordinate Judge found that the mortgage was a genuine transaction, that mere knowledge of the existence of other creditors did not make the transaction a fraudulent preference and that the mortgage in question had not been discharged. He, therefore, dismissed the suit. Hence this appeal.

Judgment.—We agree with the Subordinate Judge. There is no evidence that the mortgage taken by the 1st defendant from the other defendants was discharged. The mere fact that the 1st defendant acted as agent to collect the Rangoon outstandings of the other defendants does not of itself show that the mortgage-debt was discharged. Nor can that mortgage be impeached under S. 53 of the Transfer of Property Act, as it was taken for a genuine debt, *Mohamed Mirza Ravuthar* v. *Savvai Vijaya Raghunadha Gopalar* (1), and was not of the whole of the debtor's property as in *In re Jukes, Ex parte Official Receiver* (2). The appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) (1900) 23 Mad. 227 = 27 I. A. 17 (P. C.).
(2) (1902) 2 K. B. 58.